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Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

ULSTER HOME CARE INC., *et al.*,

Petitioners,

-and-

DANIEL RUBIN,

Petitioner,

v.

ELIOT SPITZER,
as Attorney General of the State of New York,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE NEW YORK COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In the wake of this Court's decision in *City of Chicago v. Morales*, 527 U.S. 41 (1999), there has been a widening conflict within this Court's own decisions, and between the decisions of lower federal and state courts, as to whether a facial attack on the vagueness of a criminal law lies only where the provision is vague in *all conceivable applications*. (*Salerno v. United States*, 107 S. Ct. 2095 (1987)) or whether the consideration of the factors suggested in *Morales* can warrant facial review despite the potential for Constitutional application of a law in limited contexts. This case presents the conflicts between *Morales* and *Salerno* for resolution in the context of a regulation (i) invoked criminally by virtue of a boilerplate form certification asking health care providers to certify compliance with unspecified "applicable" regulations, and (ii) containing no language prohibiting any conduct by providers nor providing any definitions or standards to guide law enforcement and prevent arbitrary enforcement. In this context, the following specific questions are raised:

1. Do Federal principles of due process require that vague laws be reviewed under a more exacting facial analysis where the challenged law contains no prohibition of conduct nor any definitions and standards to guide law enforcement and prevent arbitrary ad hoc interpretations by prosecutors, judges and juries who may add their own subjective meaning to the bear terms the "rate charged to the general public".

2. Do Federal principles of due process allow a State court to preclude judicial review of the vagueness of a designated "applicable" regulation in a prosecution for an alleged false certification by laypersons of blanket compliance with unspecified "applicable" State and Federal regulations under the Medicaid program.

STATEMENT PURSUANT TO RULE 29.6

Petitioner Ulster Home Care, Inc., states that UMC, Inc., is its sole corporate member and parent and that both entities are corporations organized under the New York Not-for-Profit Corporation Law and are tax exempt under the 26 U.S.C. § 501(c)(3) of the Internal Revenue Code.

PARTIES TO THESE PROCEEDINGS

Ulster Home Care, Inc., et al. v. Spitzer

Petitioners:	Ulster Home Care, Inc. James Mahoney, Executive Director Diane Wiegand, Associate Executive Director
Respondent:	Eliot Spitzer, as Attorney General of the State of New York

New York v. Rubin

Petitioner:	Daniel Rubin
Respondent:	People of the State of New York

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INTRODUCTION

This is a joint petition respectfully requesting that a writ of certiorari issue to review two related decisions of the New York State Court of Appeals dated May 10, 2001 reversing unanimous intermediate appellate court rulings which invalidated the criminal enforcement of a Medicaid regulation on its face as violating the Fourteenth Amendment's proscription against vague and standardless laws. Petitioner Ulster Home Care, Inc., (hereinafter "Ulster") commenced a declaratory judgment action against the enforcement of what has come to be known as the "public charge" regulation. Ulster obtained a preliminary injunction against any prosecution based thereon and subsequently obtained full declaratory relief. Petitioner Denial Rubin (President of a proprietary home care agency) was prosecuted for certifying compliance with all applicable regulations when in fact, the Attorney General alleged that he violated the "public charge" regulation by charging "private" pay individuals less than what was paid by the Medicaid program.

OPINIONS BELOW

The opinions of the Court of Appeals rejecting a facial attack on the use of the "public charge" regulation are reproduced in the appendix hereto, at 1a, *infra*. The decisions of the Appellate Division invalidating the "public charge" regulation on its face are reproduced in the appendix hereto at 12a and 24a.

JURISDICTION

The decisions of the Court of Appeals were rendered on May 10, 2001. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND REGULATORY PROVISIONS

The Constitutional provision applicable herein is Section 1 of the Fourteenth Amendment to the United States Constitution providing that "nor shall any State deprive any person of life, liberty, or property, without due process of law".

The regulation at issue states as follows:

> Medical assistance payments to personal care services providers for any rate year beginning on or after January 1, 1994, are made at the lower of the following rates:
>
> (i) the rate the provider *charges the general public* for personal care services; or
>
> (ii) the rate determined by the department. . . .

18 NYCRR 505.14(h)(7)(ii)(a).

The portion of the regulation described in sub-clause (a) item (i) has been called the "public charge" regulation throughout this litigation. No definitions are included as to the "public charge" language in sub-paragraph (i) above. The portion described in item (ii) has been called the "cost-based" rate and is extensively defined in the remaining regulatory text not quoted above.

STATEMENT OF THE CASE

As part of a 1997 State-wide investigation of the home care industry in New York, the Attorney General focused on a payment regulation which had been promulgated effective January 1, 1994 now known as the public charge regulation. This regulation provided that Medicaid reimbursements be at the "lower of" a provider's cost based rate or "the rate the provider charges the general public".[1] Although home care providers had been instructed to submit claims using cost-based

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1. Personal care services in New York's Medicaid program is authorized under Title XIX of the Social Security Act (*42 U.S.C. § 1396, et seq.*), popularly referred to as the Medicaid Act. Payment for Medicaid services has been governed by a general mandate contained within the Federal Medicaid Act at 42 U.S.C. § 1396a(a)(30) to assure that payments to providers of care are related to efficiency, economy and quality of care such that care will be available at least to the extent that such care is available to the general population.

rates, *no* definitions or standards were adopted either in regulation or in writing on the meaning of the terms "charges" or "general public". The regulation is passive and, on its face, did not affirmatively require that providers do anything. Instead, providers were instructed as to what rate to bill on Medicaid claims via a Medicaid Provider Manual which advised only the "rate code" set by the Medicaid agency was to be included on all such claims. No mention was included as to any other charge, whether public or private.

Ulster[2] discovered that the Attorney General was about to enforce the "public charge" concept through criminal and civil fraud actions after the Attorney General's specialized "Medicaid Fraud Control Unit" reviewed Ulster's books and records. The Attorney General determined that the rate Ulster "charged" to the "general public" was lower than the Medicaid cost based rate which Ulster had received for the period from 1994 through 1997. Significantly, in order to arrive at a lower rate, the Attorney General's staff unilaterally defined the term "general public" to mean less than 7% of Ulster's patients who were uninsured and paid for their own care at discounted amounts. He also defined "charges" to be what his audit staff saw as a standard discounted amount paid "most often" by such uninsured patients. Separate amounts billed by Ulster for holidays, transportation and supplies were not considered in the Attorney General's calculation, nor were any other amounts paid by other members of the public served by Ulster.

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2. Ulster Home Care is a non-profit, charitable corporation which has been providing services to the community it serves since 1969. Ulster currently serves the needs of approximately 47% of Ulster County's Medicaid charges who require personal care services. Ulster serves a diverse public which includes individuals who qualify for Medicaid subsidies, individuals who are under the child or adult protective services jurisdiction of the County, individuals who have insurance to pay for their care, as well as those who have no subsidies their care or are uninsured and must pay from their own pocket.

Despite the regulation's passive language, the Attorney General concluded that Ulster had violated the "public charge" regulation by billing Medicaid at the agency determined "cost based" rate when its "charges" to the "general public" were less. The Attorney General used certifications which appear on the reverse side of all claims submitted to Medicaid as the primary vehicle of enforcement by alleging that Ulster's statement of compliance was false. These certifications state that the provider has "furnished or caused to be furnished the care, services and supplies itemized and done so **in accordance with applicable federal and state laws and regulations**." The Attorney General also asserted that Ulster failed to include the discounted amounts actually paid by the uninsured category of patients on a questionnaire which asked for Ulster's schedule of fees charged to the "general public". Although he initially calculated a repayment of over $1.25 million, the Attorney General demanded payment of over $600,000 from Ulster as part of this review.

Ulster advised the Attorney General that the regulation was never implemented by the administrative Medicaid agency and that its Medicaid contract *exclusively* provided that Ulster was to be paid at the cost-based rate determined by the State with no retroactive changes. However, the Attorney General's response was to serve some 10 Grand Jury subpoena's around the Kingston community on former Board members and employees. Ulster quickly offered to pay $136,000 as all it could afford to try to settle the matter. This offer was rejected as insufficient.

A. Ulster's Declaratory Judgment Action.

Ulster commenced the underlying declaratory judgment action on May 20, 1998, and obtained a preliminary injunction on June 9, 1998 preventing the Attorney General from prosecution based on any retroactive interpretation of the "public charge" regulation as well as the existence of a contract which prohibited retroactive changes to rate. The Attorney General

was then held in contempt for procuring an indictment of Ulster and its executive staff on June 23, 1998.[3]

After the preliminary injunction was affirmed, Ulster renewed its motion for summary judgment before the trial court on the basis that *City of Chicago v. Morales* 527 U.S. 41 (1999) provided a means of facially reviewing the regulation at issue. The trial court denied summary judgment. Ulster appealed the ruling and a five member panel of the Appellate Division held that the regulation was unconstitutionally void on its face under Federal Supreme Court standards:

> In the absence of any guidance, we find that providers of personal care services were in fact "left to guess" . . . the meaning of the public charge portion of the regulation and the effect it may have on them by submitting bills to Medicaid at a DSS approved cost-based rate. "Nor can the question be solved by resort to the established canons of construction that enable a court to look through awkward or clumsy expression, or language wanting in precision, to the intent of the Legislature"

Connally v. General Constr. Co., 269 U.S. 385, 394, *supra.* (22a).

The Appellate Division found that the Legislature authorized a cost related payment system and the agency promulgating the regulations was "silent as to its construction of the public charge portion of the regulation". (*Id.*) Therefore, the Attorney General's interpretation "would be as likely to defeat the purpose of the Legislature [and DSS] as to promote

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3. Both the civil court judge and the criminal court judge prevented the Attorney General from going forward with the arraignment. The preliminary injunction and contempt findings were then affirmed by the Appellate Division on April 13, 1999. The Attorney General's criminal proceeding — initiated in contempt of court — was dismissed with leave to appeal denied by the Court of Appeals. (*See People v. Doe*, 271 A.D.2d 29, 710 N.Y.S.2d 420 (NYAD 3Dept. 2000), lv. denied per Wesley, J.)

it". (App. at 21a). Citing to this Court's decision in *City of Chicago v. Morales*, *supra*, The Appellate Division concluded that "in the specific context of the personal care services industry, we are constrained to find that the rate charged to the 'general public', in the absence of guidance or definition, is standardless". (22a).

While the Appellate Division analyzed every aspect of the application of the "public charge" regulation, including the fact that Department staff in the agency which promulgated it affirmatively stated that there were no definitions of the terms and "no guidance" could be provided, a five member panel of the Court of Appeals reversed the Appellate Division's facial invalidation of the "public charge" regulation. Significantly, the Court of Appeals provided no analysis whatsoever on why the regulation could be constitutionally applied by prosecutors, judges and juries when there was an utter lack of any definitions or standards. The Court simply held that the regulation could be understood by ordinary people because its terms were found in other unrelated laws. Nor did the high court provide any basis as to how a passive regulation could ever be the basis for any affirmative criminal conduct. The Court of Appeals refused to apply or distinguish any of the key Supreme Court decisions which apply to the facts herein.

B. The Rubin Prosecution.

Mr. Rubin was the founder and principal of Allstate Home Care, Inc. ("Allstate"), a Dutchess County, New York home care services agency, which, among other things, provided services to Medicaid patients, to uninsured patients just above the Medicaid threshold, and to patients covered by other government and insurance programs. Whereas Ulster pre-empted a criminal prosecution by obtaining an injunction, the Rubin case went through the criminal trial process.

Rubin was prosecuted, convicted and sentenced principally to 4 and 2/3 to 14 years in prison, a $50,000 fine

and $620,237.20 in restitution. The Counts at issue here are Count One of the indictment charging second degree grand larceny on a theory of larceny by false pretenses, Penal Law § 155.40, and Counts Two through Seven charging first degree filing of a false instrument, Penal Law § 175.35, and Count Eight, charging § 175.35 as to a cost report submission. With respect to Counts One through Seven that were reversed below, Mr. Rubin was prosecuted for submitting Medicaid certifications containing allegedly-false, boilerplate statements that the signatory had "furnished or caused to be furnished the care, services and supplies itemized and done so *in accordance with applicable federal and state laws and regulations*." The prosecution contended that the certifications were false because Mr. Rubin "violated" the "public charge regulation," a sub-sub provision of a lengthy regulation which states passively, and without expressly prohibiting any conduct by the public, that the State pays for Medicaid services by home health care providers at the "lower" of the provider's designated Medicaid rate or the provider's "rate charged to the general public" 18 NYCRR § 505.14(h)(7)(ii)(a)(1). Count Eight was predicated on Mr. Rubin's answer as part of a questionnaire submitted to the Medicaid agency as part of his cost report requesting his fee schedule. During the trial, agency administrators admitted that this fee schedule was never used in setting anyone's "Medicaid" rate.

As had been alleged in the Ulster case, testimony in Rubin's trial revealed that the public charge regulation had not been implemented by the administrative agency that set Medicaid payments. Testimony also revealed that one government witness (the Director of the Medicaid policy unit dealing with payments) did not know of the "public charge" regulation and another (charged with setting the "cost-based" rate) did not know of any definitions for the terms involved in the "public charge" regulation. In the words of the

individual who supervised the personal care rate setting office for the State Medicaid agency:

A **There is no definition of general public.**

Q And in fact, did you ever see any kind of literature from the department as to the definition of what would constitute the general public?

A **No.** (*People v. Rubin* Record, 337-339.)

Testimony and documentation also revealed that the Medicaid agency charged with enforcing home care regulations expressly refused to apply the "public charge" portion of the regulation in setting payment rates for the period from January 1, 1994 through January 1, 2000. The Medicaid agency is separate and apart from the Attorney General's office and is run by the Governor of the State through the State Department of Health. This agency began to implement the public charge concept effective January 1, 2000, presumedly due to the Attorney General's State wide investigation.

The Appellate Division reversed Mr. Rubin's conviction as to Counts One through Seven based on a strict legal analysis of the threshold issue of the regulation's clarity and lack of standards. It found that the holding in *Ulster* invalidating the regulation precluded any prosecutions thereon. The Court of Appeals' reversal in *Ulster* led to the reversal in *Rubin*. The Court of Appeals held that the "public charge" regulation was not unconstitutionally vague as to him. No analysis was provided as to how the blanket certifications of compliance with a passive regulation could support Mr. Rubin's conviction "as applied" under such circumstances. Similarly, the Court failed to address the fact that for an entire year charged under the indictment, the certifications did not even include the words which the prosecutor represented as being included therein. The form certifications were not revised to include such boilerplate compliance language until approximately a year after the initial time frames referenced in the indictments.

For the following reasons, Petitioners respectfully request that the Supreme Court grant Certiorari in this case and vacate these decisions of the Court of Appeals.

REASONS FOR GRANTING THE WRIT

I.

THE LEGAL STANDARD FOR FACIAL CHALLENGES IN NON-FIRST AMENDMENT CASES HAS PRODUCED CONFLICTING DECISIONS ACROSS THE NATION AND SHOULD BE CLARIFIED BY THE SUPREME COURT.

In rejecting Petitioners' facial challenge, the Court of Appeals in New York followed a line of cases precluding such challenges outside of the First Amendment context. Such a ruling conflicts with this Court's 1999 decision confirming the use of a "facial" analysis in challenges involving the criminal application of unconstitutionally vague laws. (*See Morales v. City of Chicago*, 527 U.S. 41).

The Court's opinions in *Morales* have not definitively set the standard of review in cases wherein there are no allegations of First Amendment free speech violations. Instead, courts across the Nation are applying pre-*Morales* precedent which prohibits any facial challenge if the challenger falls generally within the scope of the challenged law. In effect, courts are applying the rule as enunciated in *United States v. Salerno*, 481 U.S. 739 (1987): a "facial challenge to a legislative Act is . . . the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." (*Ibid.* at 745.) In *City of Chicago v. Morales*, *supra*, the Court failed to apply this standard in the area of criminal enforcement of vague and standardless laws. Because a substantial number of courts across the Nation are still applying the *Salerno* standard in deciding vagueness challenges and because other courts are either ignoring the *Morales* decision or following the dissenting opinions therein, it is respectfully submitted that the Court should grant Certiorari in order to clarify the appropriate standard of review.

Here, the Court of Appeals applied pre-*Morales* standards, citing to its longstanding rule that where actions are "plainly within the ambit of the statute, the court will not strain to imagine marginal situations in which the application of the statute is not so clear". (*See Ulster*'s citation to *People v. Nelson*, 69 N.Y.2d 302, 308, 514 N.Y.S.2d 197, 199, 506 N.E.2d 907; citing to *United States v. Mazurie*, 419 U.S. 544, 550; *United States v. Raines*, 362 U.S. 17, 20-22; *Broadrick v. Oklahoma*, 413 U.S. 601, 610-611).

Each of the Supreme Court cases cited by the Court of Appeals under *Nelson* deals with situations where the great majority of acts would normally be interpreted as falling "squarely within the 'hard core' of the statute's proscriptions". (*See Broadrick v. Oklahoma*, 413 U.S. 601, 608 (1973).) In such matters, this Court has long noted that when a prosecutor runs astray "it will be time enough to consider it when raised by some one whom it concerns." (*United States v. Wurzbach*, 280 U.S. 396, 399 (1930)). In Ulster's case, there is no lack of standing since criminal enforcement was not only imminent but the Attorney General proceeded in contempt of court. Such circumstances represent an exception to the general rules of standing as enunciated in *Broadrick*, *supra*. (*See Los Angeles Police Dept. v. United Reporting Pub. Corp.*, 528 U.S. 32 at 33-34 (1999)) ("facial" challenges may be permitted and challengers may "rely on the effect of the statute on parties not before the Court" where "threat of prosecution . . . hangs over their heads".)

The original rule began with Justice Holmes' opinion in *United States v. Wurzbach*, *supra*, as a common sense rule which estopped criminal defendants from challenging laws which were valid in the great majority of their applications. This rule has now been used a test for facial invalidity which requires the reverse, i.e., that the law be invalid in *all of its applications*. If *Salerno*'s "any set of facts" test continues to be used to summarily dispose of the great majority of vagueness challenges, such will rival the lowest level of scrutiny allowed

by this Court under Equal Protection case law wherein "the burden is upon the challenging party to negative **any reasonably conceivable state of facts** that could provide a **rational basis** for the classification." (*Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356 (2001) (internal quotations omitted).)

A. *Morales* and *Salerno* represent conflicting lines of authority on the standard of review for "facial" challenges to criminal laws, producing conflicts among and between Federal and State Courts.

This Court's decision in *Morales* significantly affected the standard of review in cases dealing with vagueness challenges by focusing on the extent to which laws are guided by administrative enforcement standards. First, three members of the Court noted that the *Salerno* standard was not the Court's uniform standard for facial challenges and that when "vagueness permeates the text . . . it is subject to facial attack." (*Morales*, 527 U.S. at 55 (opinion of Stevens, J., joined by Souter, J. and Ginsberg, J.)) Second, two members of the Court concurred in the judgment on the basis that the ordinance at issue failed to include "sufficient minimal standards to guide law enforcement officers." (*Morales*, 527 U.S. at 65-66 (concurring opinion of O'Connor, J., joined by Breyer, J.)) Third, the concurring opinion of Justice Breyer noted that where a law lacks enforcement standards, "every application of the ordinance represents an exercise of unlimited discretion" and "the ordinance is invalid in all its applications". The opinion further noted that if a challenged law violates due process "on its face . . . , specification of details of the offense intended to be charged would not serve to validate it". (*Morales*, 527 U.S. at 71, quoting from *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939)).

The conflict between the plurality in *Morales* and the plurality of Justices who believe that *Salerno* must be uniformly applied, reveals that there are two competing lines of authority under this Court's decisions to date. The *Morales* line of cases considered a number of factors in determining whether "facial"

review is appropriate. In the context of vagueness, "where a statute imposes criminal penalties, the standard of certainty is higher." *Kolender v. Lawson*, 461 U.S. 352, 358 and n.8 (1983). This factor alone has led the Supreme Court to "invalidate a criminal statute on its face even when it could conceivably have had some valid application." *Id.*; *Colautti v. Franklin*, 439 U.S. 379, 394-401 (1979); *Winters v. New York*, 333 U.S. 507, 515 (1948).

Second, as the Court held in *Kolender*, a statute may be "unconstitutionally vague on its face because it encourages arbitrary enforcement by failing to describe with sufficient particularity what a suspect must do in order to satisfy the statute." 461 U.S. at 358 n.8. The Supreme Court reaffirmed this principle in *City of Chicago v. Morales*, 527 U.S. 41 (1999). A six-member majority held that a loitering ordinance was unconstitutional on its face because it vested too much discretion in police officers enforcing it. While the case produced various opinions from the justices, on this point six justices decried the absence of "guidelines" in the ordinance, and ruled without regard to the facts as applied. *See id.* at 60-63; *see also id.* at 71. Such standards are, as the Appellate Division in *Ulster* noted, absent here as well, and accordingly call for a facial treatment.

As such, in criminal cases and those where undue discretion is allowed with respect to enforcement, this Court has permitted facial review without requiring a showing of vagueness in every application. As noted, in *Morales*, for example, to the dissent's complaint that the Court had transgressed the "every conceivable application" principle, commonly associated with *United States v. Salerno*, 481 U.S. 739, 745 (1987) (which even the dissent acknowledged to be exception-ridden, *see id.* at 76-83), it was explained that such expressions were dictum "which has never been the decisive factor in any decision of this Court," and that a constitutional violation is present where vagueness "permeates" the law in question. *Id.* at 55 n.3 (Opinion of Stevens, joined by Souter and Ginsberg).

Despite the holding in *Morales*, many courts are applying *Salerno* as a near jurisdictional prerequisite to all facial attacks in non First Amendment cases. Many cases even cite to the dissent in *Morales* in applying the *Salerno* standard. These issues were the subject of various opinions in 1996 when this Court rejected the opportunity to clarify the standard in an abortion related case. Justice Stevens commented that *Salerno* "summarized a long established principle of our jurisprudence" by stating that a law's potential invalidity under some conceivable set of circumstances is insufficient to render it wholly invalid. However, Justice Stevens further noted that "[u]nfortunately, . . . the *Salerno* opinion went well beyond that principle". (*See Janklow v. Planned Parenthood, Sioux Falls*, 517 U.S. 1174 (Memorandum of Stevens, J., on denial of Certiorari).) Yet, this concept was at the heart of the New York Court of Appeals' rulings herein. Although the Appellate Division specifically applied the *Morales* standard, the Court of Appeals reversed noting that those who clearly fall within a law's scope may never argue that it may be unconstitutionally applied to others.

This Court is decidedly fractured on the two competing levels of Constitutional review. The dissent in *Janklow*, noted that the question of *Salerno*'s applicability was a "question that virtually cries out for our review." (*Janklow*, 517 U.S. 1174 at 1178 , Scalia, J., dissenting on denial of certiorari.) Although *Janklow* was an abortion related case, the dissenters noted that "the courts of appeals regularly enforce that supposed dead letter (referencing *Salerno*'s application outside of abortion context), often in cases in which its 'draconian' character prevents the facial challenge from succeeding". (*Id.*) As such, this was "all the more reason to grant certiorari and make that clear." (*Id.*) Clearly, the dissenters viewed *Salerno*'s continued application in non-Abortion cases to be worthy of review if the *Salerno* principle was indeed a "dead letter".

B. Conflicts among the State and Federal Courts.

State and Federal court decisions in this area have also split over whether the correct standard of review should be the *Salerno* line of authority precluding judicial review of all but a very few "facial" attacks or the views set forth in *Morales*. The fact that this Court is so fractured has contributed to the failure of many courts to even recognize an alternative to *Salerno*. Nevertheless, in a number of recent cases, State courts have begun to disavow the *Salerno* formulation. (*See Holeton v. Crouse Cartage Co.*, 92 Ohio St. 3d 115, 748 N.E.2d 1111, (2001) (Majority "ignores" *Salerno* standard and facially invalidates statute dealing with workers compensation waivers); *Robinson v. City of Seattle*, 102 Wash. App. 795, 10 P.3d 452 (2000) (Noting that the "*Salerno* test" has not been followed by the Supreme Court).

Other State court decisions have explicitly rejected *Salerno* as constitutionally mandated in the review of vagueness challenges. (*See Rodriguez v. State*, 2001 WL 395399, Tex. App.-Houston [14 Dist.] (2001).) In *Rodriguez* a Texas appeals court held that the term "immediately" is overly vague and standardless, noting:

> There are serious conflicts in the opinions of the Court of Criminal Appeals and the United States Supreme Court as to whether a defendant is required to show a penal sanction is unconstitutionally applied as to him or in all of its possible applications before a successful **facial** challenge can be made.

In *People v. Maness*, 191 Ill. 2d 478, 247 Ill. Dec. 490, 732 N.E.2d 545 (2000), the Illinois high court invalidated the "wrongs to children act" where the statute did not set forth standards to regulate what constitute "reasonable steps" and no guidelines existed for authorities to follow in evaluating what "reasonable steps" are from case to case. The court noted: "This is certainly not a decision that should be left to the 'personal predilections' of the governmental authorities who must apply section 5.1." (*Id.*, 191 Ill. 2d at 485)

More disturbing are the State court decisions which have followed *Salerno* as a threshold requirement for facial review. The Court of Appeals in New York falls under this line of authority since it has consistently and summarily precluded facial attacks noting that one whose conduct falls within the scope of the challenged law may not assert that it is vague as applied to others. As noted above, the Court of Appeals applied pre-*Morales* Federal Constitutional case law in rejecting such a challenge.

The Federal Circuit Courts of Appeal have also produced decisions which are split on whether *Salerno* bars the facial review of all challenges in non-First Amendment cases. For example, in the area of abortion related laws, the majority of cases have found the *Salerno* rule to be discredited. *Greenville Women's Clinic v. Bryant*, 222 F.3d 157 (4th Cir. 2000) (noting that the Supreme Court's decision in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), may have changed the standard allowing a facial review if law affecting fundamental rights is invalid "in a large fraction of cases").

Other courts have refused to extend the holdings of the abortion line of facial challenges to non-First Amendment, non-abortion cases. In *S.D. Myers, Inc. v. City and County of San Francisco*, 253 F.3d 461 (9th Cir. 2001), the Ninth Circuit noted that three Supreme Court Justices have stated in dicta, "To the extent we have consistently articulated a clear standard for facial challenges, it is not the *Salerno* formulation" and that "another plurality of Justices is equally adamant that *Salerno* is the correct standard in every context, with the exception of certain First Amendment cases. (Thomas, J., dissenting, joined by two Justices)"; The Ninth Circuit then reasoned:

> While we have held that *Casey* "overruled *Salerno* in the context of facial challenges to abortion statutes," *Lawall, 180 F.3d at 1027*, "**we will not reject *Salerno* in other contexts until a majority of the Supreme Court clearly directs us to do so.**" See *Rodriguez de Quijas v. Shearson/American*

> *Express, Inc., 490 U.S. 477*, 484, (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

In conflict with the reasoning of *Myers* is *Staley v. Jones*, 239 F.3d 769 (6th Cir. 2001). This case involved an individual convicted under Michigan's anti-stalking statute. The Court held that *Morales* changed the law, noting that the "debate between Justice Scalia and the plurality in *Morales* reveals, there was no '*clearly* established federal law' as determined by the Supreme Court in 1996 as to the proposition that a facial attack outside the First Amendment context did not also consider the defendant's conduct". (*Id.* at 790.) The Sixth Circuit noted that its own precedent was inconsistent, citing to *Belle Maer Harbor v. Charter of Township of Harrison*, 170 F.3d 553, 557 (6th Cir. 1999) ("even in cases not involving First Amendment rights, we have recognized that courts may engage in a facial analysis where the enactment imposes criminal sanctions.") (*Staley*, 239 F.3d at 790 n.26).

Similarly, other Federal Courts have expressly identified the schism in the Supreme Court's decisions. (*Lerman v. Board of Elections in City of New York*, 232 F.3d 135 (2d Cir. 2000)) ("It is not even clear that *Salerno's* 'no set of circumstances' test articulates an exclusive standard for making facial challenges *outside* the First Amendment context", citing to *Morales*); *United States v. Kafka*, 222 F.3d 1129 (9th Cir. 2000) (Noting that the plurality in *Morales* was "criticizing *Salerno* and suggesting that a plaintiff can prevail on a facial challenge by merely showing a statute is unconstitutional in most cases"); *Gulf Power Co. v. United States*, 187 F.3d 1324 (11th Cir. 1999) ("Three Supreme Court Justices have recently questioned *Salerno's* 'no set of circumstances' formulation of the facial challenge standard and suggested that a plaintiff can prevail on

a facial challenge by merely showing the Act is unconstitutional in most cases"); *United States v. Frandsen*, 212 F.3d 1231, 1236 n.3 (11th Cir. 2000) (collecting authorities); *Planned Parenthood v. Farmer*, 220 F.3d 127, 142 (3d Cir. 2000) (collecting cases). *See* Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1322 (2000) (describing recent scholarly agreement on this point); *see also* Michael C. Steel, *Constitutional Law – The Vagueness Doctrine: Two Part Test, or Two Conflicting Tests?*, 35 Land & Water L. Rev. 255, 271 (2000).

Other Courts have simply ignored *Morales* and continue to apply the *Salerno* standard. In fact, some cases cite to the dissent in *Morales* and apply the *Salerno* rule. *West v. Derby Unified School District*, 206 F.3d 1358 (2000) ("we believe cases of alleged unconstitutional enforcement of a public school district's disciplinary policies, like any other laws, are best addressed in most instances 'when (and if) they arise, rather than prophylactically through the disfavored mechanism of a facial challenge.' ") (*Ibid.* citing to *Morales*, 527 U.S. 41, Thomas, J. dissenting.) *See also Smith v. Greene County School District*, 100 F. Supp. 2d 1354 (2000) (reasoned that since "Justice Stevens declined to resolve the continuing viability of the *Salerno* doctrine" in the *Morales* case, it should follow Justice Scalia's dissenting opinion.)

In one recent case, the First Circuit applied *Salerno*'s test to foreclose a challenge to legislation enacted in the State of Maine, designed to pass along discounted prices to the uninsured.[4] (*Pharmaceutical Research and Mfrs. v. Concannon*, 249 F.3d 66, 77 (1st Cir. 2001). The concurring opinion noted that many Courts across the Nation are still applying *Salerno* in

4. Coincidentally, Maine's statute seeking to benefit the uninsured is the exact opposite of the policy interpretation made by the Attorney General herein, i.e., that the uninsured are the only class of patients deemed to be the "general public". The Attorney General's interpretation of "charges to the general public" precludes Ulster from providing discounts to the uninsured for fear of the Attorney General's insistence that the Medicaid cost-based rate be replaced with such "charges to the general public".

a dispositive manner: "It is true that the *Salerno* decision has been criticized in later opinions of some Justices of the Supreme Court. *** *Salerno*, nevertheless, continues to be cited by both the Supreme Court and the Courts of Appeals." (*Concannon*, 249 F.3d at 94-95.) The Circuit Court in *Concannon* refused to extend *Morales* to such facial attacks, reasoning that "[i]f such an extension of the jurisprudence of **facial** challenges expressed in decisions of the Supreme Court of the United States is to occur, it is more appropriate that it occur in an opinion of that Court than in an opinion of a Court of Appeals." (*Concannon*, *supra*, at 95.)

In contrast, cases such as *Forbes v. Napolitano*, 236 F.3d 1009 (9th Cir. 2000) (invalidating an Arizona statute which criminalized medical experimentation on vagueness grounds), apply *Morales* in a straightforward fashion without any reference to *Salerno*. Here, the Ninth Circuit applied a heightened level of review as appropriate in criminal cases, noting that

> a statute would be impermissibly vague even if it did not reach a substantial amount of constitutionally protected conduct, because it would subject people to the risk of arbitrary deprivation of their liberty. . . . But where a statute criminalizes conduct, the law may not be impermissibly vague in any of its applications.

Forbes, 236 F.3d at 1012 citing to *Kolender*, 461 U.S. at 357. The court later corrected this last statement, rephrasing its view that "where a statute criminalizes conduct, the law may be invalidated on vagueness grounds even if it could conceivably have some valid application." (*Forbes*, *supra*, as modified at 247 F.3d 903). The Appellate Division's decision which was reversed by the Court of Appeals herein is another example of a straightforward application of *Morales*.

The conflicting decisions described above sit on either side of a clear fault line which has developed in the Supreme Court's precedents. As Justice Scalia noted in *Janklow*, *supra*, it is cases

such as Petitioners' herein which cry out for resolution. Particularly since the Appellate Division clearly applied *Morales* and the Court of Appeals ignored it. As such, the case herein cries out for review and reversal.

In this context, the danger of allowing this Court's *Morales* standard to be ignored is that innocent people will be subjected to criminal prosecutions without any available Court review until after their rights have been trammeled. Moreover, allowing criminal prosecutions where no standards exist forces individuals to waive their rights and plead guilty to offenses to avoid the extensive penal terms sought by a prosecutor in such cases.

C. This Joint Petition presents compelling grounds for addressing the conflicts in State and Federal Courts regarding the standard for "facial" challenges.

There are three factors which make this Joint Petition ideal for resolving the conflicts between the Court's decision in *Morales* and the *Salerno* standard. First, there are no First Amendment issues involved herein. As such, this Petition pointedly raises the appropriate standard of review for non-First Amendment rights. Second, the Joint Petition represents extremes as to the potential applicability of the challenged law. In *Ulster*, the Petitioner had obtained full declaratory relief without a trial or discovery simply on the face of the "public charge" regulation in the context of Ulster's admitted facts. In *Rubin*, the Petitioner was indicted and convicted after a full jury trial.

Lastly, the high court failed to provide any limiting construction as to the "public charge". In effect, the high court leaves it for juries to decide on a case by case basis, whether a provider believed that "general public" was restricted to "private" paying patients only and what level of "charge" could form the basis of a violation. In another case, a prosecutor will be free to charge a provider with failing to bill Medicaid at the lowest "charge" to any single member of the "general public", even though the provider may collect higher amounts from

certain patients who may provide payment at a "list" price. The prosecutor is also free to modify the term "general public" on a case-by-case basis, or he may substitute some other passive regulation as a violation given the certification of compliance with all "applicable" regulations.

Nothing will guide the prosecutor or the jury in developing such standards other than the Attorney General's own thoughts of what sound Medicaid policy should be. "[A] criminal conviction ought not to rest upon an interpretation reached by the use of policy judgments rather than the inexorable command of relevant language". (*M. Kraus & Brothers., Inc. v. United States*, 327 U.S. 614, 626 (1946).) Without objective standards, there are a multitude of ways in which the public charge regulation may be interpreted. Given this range, the result of the high court's decision will be to allow policy issues to be resolved by various juries on a case-by-case basis. As noted by Justice Brewer, siting as circuit judge: "The criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable. There must be some definiteness and certainty." *Tozer v. United States*, 52 F. 917 (D.C. Mo. 1892). Justice Brewer references the law of the Chinese Penal Code, which reads: " 'Whoever is guilty of improper conduct, and of such as is contrary to the spirit of the laws, though not a breach of any specific part of it, shall be punished at least forty blows; and when the impropriety is of a serious nature, with eighty blows.' " He then concludes that there is very little difference between such a statute and one which would make it a criminal offense "to charge more than a reasonable rate". (*Id.* at 920.)

The failure to provide any limiting construction is a critical violation of due process in and of itself. It is crucial in a regulatory context that the Supreme Court clarify the standards to be applied where laws are challenged under the second prong of the vagueness test. In many cases, words dealing with common and ordinary terms (e.g., importuning, or jostling, or stalking, or affiliated, etc.) may be resolved by the common understanding these terms have developed in our culture. In these cases, the great majority of those brought into the

criminal justice system may likely fall within the rules. And the juries in such cases may be properly instructed thereon. The instances will be rare where prosecutors will expand upon the traditional focus of such crimes. However, this is not the case where prosecutors are free to utilize blanket certifications of compliance and mine thousands of regulations as the basis for alleging false certifications. The potential for abuse by specialized prosecutors in this area, zealous in their pursuit of restitution and prison sentences, is self-evident.

Unlike words of common usage, where words are used as part of a complicated regulatory program, where it is the standard to define ad nauseam rather than to leave vague, and where the meanings of terms are laced with government policy implications, it is essential that the regulatory agency define the terms of art to be used before criminal enforcement is sought. Otherwise, a prosecutor may arrive at his or her own technical interpretation and apply such interpretation retroactively to place unsuspecting parties in jail.

The technical interpretation at issue herein is an extreme example of this point. The Attorney General asserts that a totally passive regulation affirmatively required that home care providers conform their billing practices to the "public charge" concept. He then defines "general public" to mean only "private" uninsured patients. This interpretation is diametrically opposed to the dictionary meaning of "general public". Additionally, the Attorney General's interpretation of "charges" is one out of 10 distinct ways in which this term could be reasonably interpreted.[5]

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5. Medicare regulations have yet to define "actual charge". A regulatory proposal on this definition notes: "There is no definition of 'actual charge' in the Medicare statute, and some would argue that 'actual charge' means whatever amount the physician, supplier, or other person who furnishes the service states it is, regardless of whether he, she, or it charges the beneficiary or the beneficiary's private plan that amount or makes any effort to collect it. In fact, because of the prevalence of participation in private plans, the physician, supplier, or

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The Appellate Division in this case explored the potential of developing such a limiting construction, but had to reject it since there was no legislative intent to support the Attorney General's construction. In this respect, as noted by the Supreme Court, not even the Courts should set about defining otherwise vague laws when important policy issues have been left unresolved:

> As this Court long ago explained, "it would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government." (See *Reno v. American Civil Liberties Union*, 521 U.S. 844, 845 FN 49 (1997), quoting from *United States v. Reese*, 92 U.S. 214, (1875).)

Five judges of New York's intermediate appeals court found the law to be impossibly vague and standardless. Five judges of the State's high court summarily reversed, finding the law to be clear to the ordinary health care provider. Rather than adopting a limiting construction, the high court left it to the juries to decide each provider's fate. Incredibly, in the Rubin case, the jury was given no instruction on the definition of "general public" or "charges". Instead, the only directions given to the jury was whether they believed that the defendant thought that he was violating the regulation. This was proven not by admissions but by the after the fact testimony of disgruntled former employees.

Given this context, Petitioners strongly believe that this case provides the best context to both correct insidious violations

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other person might never charge or expect to collect this amount from anyone." (*See* 62 FR 33158, Proposed Fee Code Changes for 1998, at R-292).

of due process caused by enforcement of standardless regulations and clarify the standard of review to be applied in vagueness challenges outside of the First Amendment context.

II.

THE DECISION BELOW MISAPPLIED SUPREME COURT PRECEDENT TO PRECLUDE REVIEW OF VAGUE REGULATIONS.

As a "separate basis", the Court of Appeal's decision in *Ulster*, held that the underlying regulations, being only an element in the crime of falsely certifying compliance with "applicable" regulations, may not even be tested for vagueness. The Court of Appeals relied on this Court's decision on a McCarthy era law which affirmed a prosecution for lying about membership in the Communist party. (*Bryson v. United States*, 369 U.S. 64 (1969).) This represents a gross misapplication of *Bryson* and necessarily leaves the decision as to a regulation's clarity to the trier of fact — the jury. Based on the preclusive effects that the New York decision will have on the ability of all health care providers to challenge regulations on vagueness grounds, it is respectfully submitted that review is appropriate to avoid substantial injustice for all those who will now be subject to this preclusive ruling.

This Court has followed *Bryson* for the proposition that one who lies in response to governmental questions may not avoid the consequences of such lies by claiming that the government had no basis upon which to ask the questions. (*See United States v. Mandujano*, 425 U.S. 564, 577 (1976)). However, this Court has never applied *Bryson* as a bar to judicial review of certifications which incorporate by reference vague legal provisions. The result of such a preclusion in this case will allow juries to decide legal issues as to whether a provider falsely certified compliance with all "applicable regulations". Trial courts in New York will be precluded from examining the underlying regulations to determine whether they are "applicable" or even to determine whether they were ever enforced by the agency.

The breadth of power given to prosecutors by this ruling is frightening. These circumstances violate not only the basic principles underlying the due process clause of the Fourteenth Amendment, but conflicts with the essential checks and balances of democracy identified as first essentials since the time of Aristotle.[6]

Health care providers face the threat of criminal prosecution with each and every claim that they submit for payment noting that they have complied with "all applicable regulations". If the New York Court's application of *Bryson* insulates all such "regulations" from constitutional attack by either declaratory action or even within the criminal trial, we have taken a step back into the star chambers of the Fourteenth and Fifteenth centuries. For example, in this case the Attorney General's allegation concerned a regulation which neither prescribed nor proscribed any conduct whatsoever. The "public charge" regulation is entirely passive and several courts in other States have declined to allow prosecution of false claims thereon, interpreting identical language as not requiring that a provider do anything at all. In *People v. Duz-Mor Diagnostic Laboratory, Inc.*, 68 Cal. App. 4th 654, 80 Cal. Rptr. 2d 419 (1999), the California Court of Appeal rejected a false claims action brought by California's Attorney General relating to the provision of

6. As noted in a popular historical text:

> By the end of the fourth century it had come to be necessary to emphasize that "in a democracy the laws should be masters". Against this background certain famous passages in Aristotle, . . . appear as a vindication of that traditional ideal. *** "*It is of great moment that well drawn laws should themselves define all the points they possibly can, and leave as few as possible to the decision of the judges [for] the decision of the lawgiver is not particular but prospective and general, whereas members of the assembly and the jury find it their duty to decide on definite cases brought before them.*"

(From Origin of the Rule of Law, Friedrich A. Hayek, *The Constitution of Liberty*, University of Chicago Press, 1960 pp. 162-175).

discounts to "private" pay patients. The court noted that the Attorney General found "the practice is unfair to the public because Medi-Cal is not offered similar discounts". However, the passive nature of the regulations precluded any assertion of false claims. As held by the court, "[u]nder those regulations, Medi-Cal will pay no more than the lesser of the amount billed, the charge to the general public, Medicare's allowance, or scheduled amounts. . . ." *Medi-Cal, not Duz-Mor, controls the amount Medi-Cal pays.* (*See also United States of America v. Bruno's, Inc., et al.*, 54 F. Supp. 2d 1252 (M.D. Ala. 1999)) (It is "the Alabama Medicaid Agency itself, and not the Defendants, that sets the amount of the dispensing fee. . . . Defendants merely charge the fee Medicaid tells them to charge".)

Apart from whether it even reaches the public charge regulation, the scope of the "laws and regulations" embraced by the form certification applies to all "applicable federal and state laws and regulations." Unlike a certification of a particular fact, where the person can focus on the accuracy of that fact, this certification requires a layperson to make sweeping, multifaceted legal judgments of infinite scope. Such a process undermines the notice principle of due process and invites arbitrary prosecutorial behavior. The theory exposes those who do business in regulated industries to criminal prosecution on the basis of a multitude of regulations, many no doubt poorly-drafted and never conceived as defining criminal behavior.[7]

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7. The New York health care regulations occupy hundreds of pages and typically consist of complex, multi-part regulations like the public charge regulation here. By way of illustration, 18 NYCRR § 505.14, of which the public charge regulation is one small part, occupies some 38 pages in the official volume of regulations. 18 NYCRR Part 505 in total occupies 161 pages. 10 NYCRR Part 86, relating to rates for medical facilities, is 406 pages. 10 NYCRR Part 405, relating to hospital standards is 111 pages, and 10 NYCRR Part 415, relating to nursing home standards, is 68 pages. These are just some of the state's regulations. Federal regulations are equally prolific.

Subsequent decisions of this Court have clearly allowed for judicial review of ambiguous questions in prosecutions for perjury and false statements. Courts have recognized that citizens have an important interest in participating in government functions without fear of prosecution over ambiguous demands for information. One reason that perjury may not be premised on ambiguous questions is to encourage citizens to participate in the judicial system. *Bronston v. United States*, 409 U.S. 352, 359 (1973). The same policy applies to individuals who must submit forms to participate in government programs. *See United States v. Manapat*, 928 F.2d 1097, 1100 (11th Cir. 1991) ("Members of our society are often asked to fill out standardized forms containing large numbers of general background questions. . . . unwary citizens should be able to expect that important questions will not be hidden in laundry lists of unrelated topics."); *United States v. Ryan*, 828 F.2d 1010, 1015 (3d Cir. 1987) (encouraging participation in banking system).

Citizens who are at risk of prosecution based on broad statements of regulatory compliance should have the right to obtain injunctive relief and judicial review under such circumstances. This Court's decision in the case of *Cramp v. Board of Public Instruction*, 368 U.S. 285 (1961), is applicable to *Ulster*'s position in this respect. This Court held that a teacher had standing to bring a suit contesting a vague loyalty oath because "the very vice of which he complains is that the language of the oath is so vague and indefinite that others could with reason interpret it differently". (*Cramp*, 368 U.S. at 284.) Similarly, *Ulster* (as well as any other similarly situated provider) should have the ability to contest a regulation whose terms were too vague to be used in a criminal context. *See Goland v. United States*, 903 F.2d 1247, 1253 (9th Cir. 1900) (*Bryson* does not insulate review of focus of charges.).

Participation in any aspect of government regulated areas — whether it be as a provider in a health care program or as a driver of a car — may be conditioned on certifying that one is

in compliance with "all applicable" laws or that one has "done no wrong". This creates an extremely broad net for enforcement purposes. Precluding review of the underlying regulation ensures that a defendant is at the complete mercy of the prosecution's unilateral interpretation thereof. No other court has given this much discretion to a state-wide prosecutor.

Under the New York high court's decisions, a prosecutor may disclaim that he or she is enforcing a particular regulation and instead argue that he is enforcing the false claims and larceny laws for lying about compliance with all "applicable" regulations. Yet the policy issue behind such enforcement remains the Attorney General's belief that discounts given to the uninsured should have been passed along to Medicaid. This creates an even more significant threat. As Justice Breyer noted in his concurring opinion in *Morales*, a law which makes it a crime to do wrong is vague in all of its applications because a prosecutor has unlimited discretion in every case. Similarly, being prosecuted for certifying that one has "committed no wrongs" is just as unconstitutionally vague in all of its applications.

III.

THE COURT'S RULING VIOLATES THE TRADITIONAL PRECEDENTS OF THIS COURT ON THE MERITS OF THE VAGUENESS CHALLENGE.

Where a State court's decision is "flatly contrary to this Court's controlling precedent", certiorari is appropriate. Accordingly, the refusal of New York's Court of Appeals to follow *Morales*, *supra*, as well as the Court of Appeals' refusal to apply *Connally*, *infra*, provide substantial reasons for granting Certiorari. (*See Arkansas v. Sullivan*, __ U.S. __, 121 S. Ct. 1876, 1878 (2001).

The law at issue in *Ulster* and *Rubin* is extraordinarily similar to the rule invalidated by this Court in *Connally v. General Construction Co.*, 269 U.S. 385 (1926). *Connally* has been cited favorably for the past 75 years by both Federal and State appellate courts. The Appellate Division heavily relied

upon *Connally* in its decision before reversal. Since *Connally* is controlling precedent as to the vagueness of undefined terms similar to "charges" and "general public", reversal would be mandated to restore the Appellate Division's application of *Connally* and *Morales* as the basis for invalidation of the "public charge" regulation.

In *Connally*, the Supreme Court analyzed whether the words of the statute could be properly applied given the varied definitions and varying rates paid by the contractor. The Court held that

> this provision presents a double uncertainty, fatal to its validity as a criminal statute. In the first place, the words "current rate of wages" do not denote a specific or definite sum, but minimum, maximum, and intermediate amounts, indeterminately, varying from time to time and dependent upon the class and kind of work done, the efficiency of the workmen, etc., . . . The statutory phrase reasonably cannot be confined to any of these amounts, since it imports each and all of them." The Court held that "to direct the payment of an amount which shall not be less than one of several different amounts, without saying which, is to leave the question of what is meant incapable of any definite answer.

Connally, 269 U.S. at 393, emphasis supplied.

Similarly, Ulster's actual prices even after discounts ranged from amounts below the Medicaid cost-based rate to amounts well above this rate. The Appellate Division herein was virtually bound to apply *Connally* under the circumstances where the only words used in the regulation was to pay the "lower" of either the rate "charged" to the "general public" or the cost-based rate. *Connally* held that

> [t]o construe the phrase "current rate of wages" as meaning either the lowest rate or the highest rate, or any intermediate rate, or, if it were possible to

> determine the various factors to be considered, an average of all rates, would be as likely to defeat the purpose of the Legislature as to promote it.

Ibid.

The Court then noted that the qualifying term "locality" was just as amenable to varying interpretations: "Who can say with any degree of accuracy, what areas constitute the locality where a given piece of work is being done?" Similarly, the qualifying term "general public" can mean anything a jury or prosecutor wishes it to mean.

The facts in *Ulster* and *Rubin* are even more compelling in that no one could predict that the "public charge" regulation would even be used administratively, let alone criminally, since it was so devoid of meaning given the extensive cost-based methods used to set reimbursement levels. When criminal enforcement transgresses into a heavily regulated field, the prosecution must be certain of the pre-existing policy in question. (*See Upton v. Securities and Exchange Commission*, 75 F.3d 92, 98 (2d Cir 1996) ("Because there was substantial uncertainty in the Commission's interpretation of Rule 15c3-3(e), Upton was not on reasonable notice that FiCS's conduct might violate the rule")

Fourteen years in prison is a heavy price to pay for failing to interpret a vague regulation which lacked an enforcement precedent, in conformity with the prosecutorial arm.

CONCLUSION

For the foregoing reasons, petitioners respectfully requests that the petition be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE COURT OF APPEALS OF THE STATE OF NEW YORK DATED AND DECIDED MAY 10, 2001

STATE OF NEW YORK
COURT OF APPEALS

No. 59

Ulster Home Care Inc., et al.,

Respondents,

v.

Dennis C. Vacco, as Attorney-General
of the State of New York,

Appellant.

OPINION

* * *

SMITH, J.:

Effective January 1, 1994, the New York State Department of Social Services ("DSS") amended the Medicaid regulation setting reimbursement rates for providers of personal care services. The amended regulation states:

> "(1) Medical assistance payments to personal care services providers for any rate year beginning on or after January 1, 1994, are made at the lower of the following rates:

> "(i) *the rate the provider charges the general public for personal care services*; or
>
> "(ii) the rate determined by the department in accordance with [a cost-based methodology]"

(18 NYCRR 505.14[h][7][ii][a][1] [emphasis added]). The primary issue here is whether "the rate the provider charges the general public for personal care services" is unconstitutionally vague. We conclude that it is not.

This case arose in 1997 during a Statewide audit and investigation by the Attorney General's Medicaid Fraud Control Unit (MFCU) of home health care agencies providing personal care services to Medicaid recipients. MFCU concluded that plaintiff Ulster Home Care had overcharged Medicaid for personal care services by approximately $600,000. MFCU concluded that instead of billing Medicaid at the DSS-determined rate (subdivision [ii] of the regulation), Ulster should have billed Medicaid at the rate it charged the general public for personal care services (subdivision [i]), which was the lower of the two rates. MFCU also concluded that Ulster had attempted to conceal the overcharges by overstating the amounts it charged its private-pay patients.

The Attorney General sought to bring criminal fraud and larceny charges before a grand jury. In May 1998, plaintiffs[1]

1. Plaintiffs James Mahoney and Diane Wiegand, executives at Ulster Home Care who also would have been implicated for overcharging Medicaid, were permitted to intervene in the action.

commenced this civil action for declaratory and injunctive relief alleging its contract with Ulster County precluded the Attorney General from replacing the reimbursement rate contained in its contract with a "public charge" rate. The action also sought to enjoin the Attorney General from enforcing the regulation, from demanding the payment of any sums based upon it and from imposing any criminal or civil liability upon the plaintiffs based upon said regulation.[2]

Supreme Court denied plaintiffs' motion for summary judgment in its entirety. The Appellate Division reversed, determining that the regulation was facially invalid because the terms "general public" and "rate" were not defined and no standards for their application were established (268 AD2d 59, 66). Following an award of attorneys' fees at Supreme Court, the Attorney General appealed to this Court from the judgment of Supreme Court pursuant to CPLR 5601(d). We now reverse.

Before this Court, the Attorney General contends that the Appellate Division erred by permitting a facial challenge rather than requiring plaintiffs to demonstrate that they could not understand the regulation and by granting summary judgment on the limited record before it.

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2. On June 9, 1998, plaintiff Ulster was granted a preliminary injunction restraining the Attorney General from prosecuting it during the pendency of the action. By order entered on July 15, 1998, the Attorney General was found in civil contempt of the June 9 order in that he had proceeded to seek an indictment against Ulster. The Appellate Division affirmed the grant of the preliminary injunction and the finding of contempt (255 AD2d 273). This prior order does not necessarily affect the judgment here and thus is not brought up for review.

Appendix A

A statute, or a regulation, is "unconstitutionally vague if it fails to provide a person of ordinary intelligence with a reasonable opportunity to know what is prohibited, and it is written in a manner that permits or encourages arbitrary or discriminatory enforcement" (*People v Foley*, 94 NY2d 668, 681; *People v Nelson*, 69 NY2d 302).

Neither the term "general public" nor "rate" as used in the regulation is so vague that it could not be understood by a person of ordinary intelligence or could be arbitrarily enforced. The challenged language has a common understanding and is used in other State Medicaid and Medicare regulations (*see, e.g.*, 8 NYCRR 247.15[c][1]; 10 NYCRR 86-1.21[d]; 18 NYCRR 415.69[e][2]; *see also*, 38 CFR 17.55[h] [Federal regulations of medical use of hospitals by veterans]; 42 CFR 413.9[a] [Federal regulation of cost reimbursement to providers in the Medicare program]). The limited application of this regulation to home personal care providers who elect to enroll in the Medicaid program and who expressly agree to adhere to its rules, coupled with the ample opportunity these providers had to understand the requirements of the Medicaid program, are further reasons to reject the argument that the public charge provision is impermissibly vague. Plaintiffs should have been required to show that the regulation was unconstitutional as applied to them. When a person's conduct falls within the proscriptions of a regulation, "a vagueness challenge must be addressed to the facts before the court" (*Nelson, supra*, 69 NY2d, at 308); (*see also, People v Rubin*, __ NY2d __ [decided today]).

Moreover, plaintiffs were not subject to prosecution because they allegedly violated the public charge regulation. Rather, the intended charges were grand larceny and offering

false instruments for filing. The alleged violation of the regulation was only an element of proof of these crimes and violation of the regulation alone, without a knowing attempt to deceive or defraud, could not support criminal liability (*see*, *United States v Larm*, 824 F2d 780 [9th Cir] [once a trier of fact determines that a person understood a regulation when it was allegedly violated, a subsequent challenge to the regulation for ambiguity is irrelevant so long as the person is actually convicted of violating a statute that provides adequate notice of the conduct proscribed]). On this separate basis, it was error to enjoin plaintiffs' criminal prosecutions (*see also*, *Bryson v United States*, 396 US 64, 68 [in a proceeding to vacate defendant's conviction based on a statute that was repealed following his conviction, the Court stated that "a claim of unconstitutionality will not be heard to excuse a voluntary, deliberate and calculated course of fraud and deceit. One who elects such a course as a means of self-help may not escape the consequences by urging that his conduct be excused because the statute which he sought to evade is unconstitutional"]).

Accordingly, the judgment appealed from and the order of the Appellate Division brought up for review should be reversed with costs and the case remitted to Supreme Court for further proceedings in accordance with this opinion.

Judgment appealed from and order of the Appellate Division brought up for review reversed, with costs, and case remitted to Supreme Court, Ulster County, for further proceedings in accordance with the opinion herein. Opinion by Judge Smith. Chief Judge Kaye and Judges Ciparick, Wesley and Altman concur. Judges Levine, Rosenblatt and Graffeo took no part.

Decided May 10, 2001

APPENDIX B — OPINION OF THE COURT OF APPEALS OF THE STATE OF NEW YORK IN *PEOPLE v. RUBIN* DATED AND DECIDED MAY 10, 2001

STATE OF NEW YORK
COURT OF APPEALS

No. 60

The People &c.,

Appellant-Respondent,

v.

Daniel Rubin,

Respondent-Appellant.

OPINION

* * *

SMITH, J.:

The People appeal from an order of the Appellate Division that reversed defendant's conviction for grand larceny in the second degree (Penal Law § 155.40) and six counts of offering a false instrument for filing in the first degree (Penal Law § 175.35). Defendant cross-appeals from the same order to the extent that it affirmed his conviction of two counts of offering a false instrument for filing.

Appendix B

Defendant, the principal owner and operator of Allstate Home Care, Inc., a Dutchess County home care services agency, was charged with defrauding the State of New York of approximately $620,000 by billing Medicaid for sums between $13.35 and $15.20 per hour for personal care services when he knew a Department of Social Services regulation limited him to the same hourly rate charged to the general public (the "public charge" provision). Defendant was convicted of second degree grand larceny for stealing in excess of $50,000 (count one). He was also convicted of eight counts of offering a false statement for filing: six counts (two through seven) were for filing specific bills which falsely stated that they were consistent with applicable regulations, one (count eight) was for certifying falsely that his cost to the general public during 1994 was $15.25, and one (count nine) was for certifying in a 1995 cost report that the salaries of two employees of another business he owned were attributable to health care services.

The primary issue before us is whether the public charge provision of the Medicaid reimbursement regulation (18 NYCRR 505.14[h][7][ii][a][1]) is unconstitutionally vague as applied to him. The first seven counts of defendant's conviction were all grounded on violation of this provision of the regulation, which reads:

> "(1) Medical assistance payments to personal care services providers for any rate year beginning on or after January 1, 1994, are made at the lower of the following rates:

Appendix B

"(i) the rate the provider charges the general public for personal care services; or

"(ii) the rate determined by the department in accordance with [a cost-based methodology]."

The Appellate Division reversed the convictions of the first seven counts and affirmed the convictions of counts eight and nine. A Judge of this Court granted leave to appeal to the People and to the defendant.

Before this Court, the People argue that defendant was properly found guilty of grand larceny and of offering a false instrument for filing by significantly overcharging Medicaid and knowingly misrepresenting that his Medicaid billings were compliant with the public charge regulation. The People further contend that the Appellate Division properly affirmed the convictions on counts eight and nine. Defendant maintains that the regulation is unconstitutionally vague and that the convictions on counts one through seven were properly reversed. He also contends that the evidence was legally insufficient to convict him of counts eight and nine.

Relying on its rationale in the companion case, *Ulster Home Care v. Vacco*, which struck down the regulation as unconstitutional on its face, the Appellate Division concluded that "there is nothing with which defendant need be in compliance and he therefore cannot be guilty of false certification in that regard" (271 AD2d 759). We reversed the Appellate Division in *Ulster*, concluding that the regulation was facially valid (*see*, *Ulster Home Care v. Vacco*, __ NY2d __ [decided today]).

Appendix B

When a person's conduct falls within the proscriptions of a regulation, "a vagueness challenge must be addressed to the facts before the court" (*People v. Nelson*, 69 NY2d 302, 308). As applied to defendant, it is clear that the public charge regulation is not vague.

There was evidence at trial that defendant understood the public charge regulation and yet created schemes to conceal his violation of it. Defendant, for example, promulgated two separate price schedules, one that was accurate and the other, kept hidden, that was designed and used to defraud Medicaid. Moreover, in 1995 and 1996, defendant instructed his staff to tell everyone other than Medicaid officials that the public rate for personal care services was approximately $12 per hour but to inform Medicaid officials that the rate was $15.25.

The People also adduced at trial that defendant had received letters from the Department of Social Services explaining that the public charge regulation restricted Medicaid payment for personal care services to the rate charged the general public. Defendant understood the regulation to mean that the private-pay rate had to be higher than that paid by Medicaid, and that he had developed a fictitious private-pay rate schedule of $15.25 per hour which no member of the general public was asked to pay. Despite these and other infractions each year from 1995 through 1997, defendant attested that he understood the regulations and that his health care facility complied with applicable State regulations. The public charge provision is, thus, not impermissibly vague as applied to defendant.

Appendix B

As the trial court noted, the People used the public charge regulation to prove the "manner" in which defendant committed larceny and defrauded the government. Defendant was not convicted solely of a violation of the regulation. Defendant had adequate notice of and understood the regulation and had the intent to contravene it. These were all triable issues which the jury resolved against defendant and served as the basis for his fraud and larceny convictions.

The evidence of defendant's guilt of counts eight and nine was legally sufficient.

Accordingly, the order of the Appellate Division should be modified by reinstating the conviction of defendant on counts one through seven of the indictment and remitting the case to the Appellate Division, for consideration of the facts and issues raised but not determined on the appeal to that court, and, as so modified, affirmed.

* * * * * * * * * * * * * * * * *

Order modified by reinstating the conviction of defendant on counts one through seven of the indictment and remitting to the Appellate Division, Third Department, for consideration of the facts and issues raised but not determined on the appeal to that court and, as so modified, affirmed. Opinion by Judge Smith. Chief Judge Kaye and Judges Ciparick, Wesley and Altman concur. Judges Levine, Rosenblatt and Graffeo took no part.

Decided May 10, 2001

APPENDIX C — OPINION AND ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT DATED, DECIDED AND ENTERED APRIL 13, 2000

SUPREME COURT — APPELLATE DIVISION
THIRD DEPARTMENT

Decided and Entered: April 13, 2000

85666

ULSTER HOME CARE INC. et al.,

Appellants,

v

DENNIS C. VACCO, as Attorney-General of the State of New York,

Respondent.

OPINION AND ORDER

Calendar Date: January 14, 2000

Before: Cardona, P.J., Peters, Carpinello, Graffeo and Mugglin, JJ.

* * *

Appendix C

Carpinello, J.

Appeal from an order of the Supreme Court (Torraca, J.), entered July 13, 1999 in Ulster County, which denied a motion by plaintiff Ulster Home Care Inc. for summary judgment.

Plaintiff Ulster Home Care Inc. is the operator of a licensed home care agency enrolled in the Medicaid program and provides personal care services to eligible Medicaid recipients pursuant to a contract, renewed annually, with the Ulster County Department of Social Services, which is responsible for various administrative aspects of the Medicaid program in Ulster County (*see*, Social Services Law §§ 365, 365-a[2][d]; §§ 367-j, 367-k, 367-n, 367-p). Although Medicaid clients account for a majority of its revenue, Ulster Home also provides personal care services to non-Medicaid clients. The charges for services to non-Medicaid clients can be paid in a variety of ways, i.e., by third-party payor sources, such as health maintenance organizations, health insurance companies and non-Medicaid State agencies, or directly by the client (this latter category is often referred to as the self-pay clients).

In April 1997, Ulster Home was the subject of an audit and investigation conducted by the office of the Attorney-General through its Medicaid Fraud Control Unit (hereinafter MFCU). According to Ulster Home, its counsel met with members of MFCU's investigative staff in March 1998 and was advised that the focus of their investigation concerned 18 NYCRR 505.14(h)(7)(ii)(a), which provides that:

Appendix C

(1) Medical assistance payments to personal care services providers for any rate year beginning on or after January 1, 1994, are made at the lower of the following rates:

(i) the rate the provider charges the general public for personal care services; or

(ii) the rate determined by the department in accordance with [a cost-based methodology].

Specifically, Ulster Home was advised that MFCU's investigation revealed that it should have been reimbursed pursuant to subdivision (i) of the regulation (hereinafter the public charge portion of the regulation), as opposed to subdivision (ii) of the regulation (the cost-based methodology), because the rate it charged the "general public" was lower than the rate established by the former Department of Social Services (hereinafter DSS).[1] At this time, an overpayment of nearly $1.2 million was apparently being sought.[2] Thereafter, MFCU limited its finding to the

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1. The Department of Social Services was dissolved in 1997 and its functions were distributed, as relevant to this case, to the Department of Health (*see*, L 1997, ch 436). Nevertheless, reference to the Department of Social Services will be made in this decision even though, in certain contexts, it might be more precise to refer to the Department of Health.

2. Ulster Home was previously reimbursed at a rate of $13.36 per hour, this rate having been set by DSS based on the cost-based methodology. According to MFCU, it charged the "general public" $12.00 per hour. It is this differential that MFCU claims was overpaid to Ulster Home.

period May 1995 through mid-1997 and the recovery allegedly due the State was reduced to $675,000.

Alleging that Ulster Home's Medicaid billing practices were undertaken with the express purpose of enriching itself at the expense of the taxpayers and that Ulster Home knowingly lied to the State about its actual charges, MFCU seeks to prosecute it for larceny and offering a false instrument for filing. Faced with the prospect of criminal prosecution because of its alleged violation of the public charge portion of the regulation, Ulster Home commenced this action seeking declaratory and injunctive relief. Plaintiffs James Mahoney and Diane Wiegand, Ulster Home's Executive Director and Assistant Executive Director, respectively, were granted permission to intervene. On a prior appeal, this court affirmed an order of Supreme Court issuing a preliminary injunction against defendant enjoining the enforcement of the public charge regulation, as well as an order finding defendant in contempt of court (255 AD2d 73).

Following this court's decision, Ulster Home moved for summary judgment seeking a declaration that defendant's threatened prosecution violates the contracts between itself and Ulster County, that defendant should be prohibited from enforcing the public charge portion of the regulation on a retroactive basis, that defendant should be prohibited from demanding repayment of funds received by Ulster Home under its contracts with Ulster County and, most importantly, that defendant should be enjoined from attempting to impose any criminal or civil liability as a result of enforcement of the public charge portion of the regulation. Supreme Court denied the motion, prompting this appeal by Ulster Home.

Appendix C

Various *amici curiae* briefs have been submitted in support of Ulster Home's position.

To fully understand the nature of this action, a brief overview of the Medicaid reimbursement program with respect to personal care services is necessary. From the inception of the personal care services program through 1994, providers such as Ulster Home had been reimbursed at rates they negotiated with social service districts around the State. This methodology resulted in negotiated payment rates which did not necessarily reflect a provider's actual costs, lacked uniformity from district to district and placed an additional administrative burden upon social service districts (i.e., negotiating payment rates) (*see*, NY Register, Oct. 13, 1993, at 43). Pursuant to the Laws of 1990 (ch 53), DSS was directed to submit to the Legislature and the Governor a plan containing criteria for the establishment of a rate-setting methodology for personal care services (*see also*, L 1993, ch 59, § 61; L 1992, ch 41, § 3). The goal of the Legislature at this time "was to require [DSS] to develop a rate setting methodology for personal care services that considers personal care services providers' *actual costs* of providing services to [Medicaid assistance] recipients" (NY Register, Oct. 13, 1993, at 44 [emphasis supplied]). Pursuant to this legislative authority, DSS promulgated regulations establishing a new methodology by which payment rates for personal care services provided on or after January 1, 1994 would be calculated. The regulation changed not only the method by which these rates would be established but also changed the entity responsible for establishing such rates (*see*, 18 NYCRR 505.14[h][7]).

Consequently, under the revised regulatory scheme, payment rates were no longer based on district negotiated rates; rather, they were determined by DSS based upon the methodology defined in 18 NYCRR 505.14(h)(7)(ii) and approved by the Division of Budget (*see*, NY Register, Oct. 13, 1993, at 45). Under the regulations, a provider with cost experience, like Ulster Home, reported its operating costs to DSS on a cost report, which, in turn, is used by DSS to establish that provider's rate (*see*, NY Register, Oct. 13, 1993, at 43). As previously noted, since 1994, DSS has calculated Ulster Home's rate during the relevant time period using this cost-based methodology.

In turning to our legal analysis, we reiterate, as strenuously emphasized by Ulster Home and the *amici curiae*, that a provider's approved Medicaid reimbursement rate is calculated by DSS, *not* the provider, and that the provider merely submits the required costs report to DSS (*see*, 18 NYCRR 505.14[h][7][i]). Once its rate is set, the provider submits bills to Medicaid for payment at the approved rate (*see*, 18 NYCRR 505.14[h][1]; 540.7). Thus, these parties argue that a gross injustice would result by criminalizing the conduct of a provider who bills Medicaid at a *DSS* promulgated and approved cost-based rate instead of "the rate" it charges the "general public". This concern is indeed compelling. Equally compelling, however, is the need on behalf of the public fisc to prosecute any provider who, although lacking the authority to *set* its reimbursement rates, submits false information to the State on, for example, a cost report in order to wrongfully obtain State funds.

Appendix C

We now address the heart of Ulster Home's complaint in this matter, namely, the constitutionality of the public charge portion of the regulation. Ulster Home claims, and we agree, that the public charge portion of the regulation is unconstitutionally vague. "A vagueness challenge to an administrative regulation raises the question of whether a reasonable person subject to the regulatory standard would comprehend what conduct was being prohibited" (*Matter of Choe v Axelrod*, 141 AD2d 235, 239). "[R]egulations must give 'sufficiently definite warning * * * when measured by common understanding and practices' * * * and articulate an objective standard which governs the exercising of the discretion and affords the possibility of meaningful judicial review" (*Matter of Slocum v Berman*, 81 AD2d 1014, 1015, *lv denied* 54 NY2d 602, *appeal dismissed* 54 NY2d 752 [citations omitted], quoting *United States v. Petrillo*, 332 US 1, 7-8; *see*, *People v New York Trap Rock Corp.*, 57 NY2d 371, 378). Indeed, the void-for-vagueness doctrine has been called " 'the first essential of due process of law' " (*People v New York Trap Rock Corp.*, *supra*, at 378, quoting *Connally v General Constr. Co.*, 269 US 385, 391). Here, in contrast to the exhaustive guidelines and standards promulgated by DSS for implementing the cost-based methodology (*see*, 18 NYCRR 505.14[h][7][ii][a][2]-[7]), *no* standards, guidelines or definitions were adopted under 18 NYCRR 505.14(h)(7)(ii)(a)(1)(i) defining what constitutes "*the rate* the provider charges" (emphasis supplied) for personal care services or what constitutes the "general public" (*cf.*, *Matter of Allen v Commissioner of Social Servs. of State of N.Y.*, 116 AD2d 35, 37).

Appendix C

We deal first with the "general public" aspect of the regulation. While providers like Ulster Home provide personal care services to individuals covered by Medicaid, they also provide these services to individuals covered under managed care programs, to State programs associated with child protective services, to members of health maintenance organizations, to persons with private health insurance and to those who self pay. Whether the term "general public" as used in the regulation includes *all* of these non-Medicaid recipients or some combination thereof is simply not clear. It is certainly not clear that "general public" only encompasses private, self-pay clients, the interpretation Ulster Home claims that MFCU has given to the term.

Internal DSS memoranda in the record confirm that the term "general public" is not defined anywhere in DSS regulations, policy statements or updates. Thus, to the extent that MFCU might argue that the term is limited to self-pay clients, neither the regulation itself nor its regulatory history confirms this standard. We also note that, in the context of personal care services, there is no prior "judicial construction of [the term] * * * [so as] to meet the requirements of the void for vagueness doctrine" (*People v First Meridian Planning Corp.*, 86 NY2d 608, 622).

Defendant repeatedly claims that the terms "general public" and "the rate" charged have well-established meaning in the Medicaid area. Curiously, however, the "well-established" meanings of these terms are not set forth. With respect to the definition of the "general public", defendant seems to advocate that it encompasses "the rest of the [non-Medicaid] world" but also contends that it encompasses

private, self-pay clients only.[3] These differing definitions notwithstanding, an internal DSS memorandum in the record reveals that it may interpret "general public" in the area of personal care service as *excluding* all "third party payors as well as facilities, institutions, and other [S]tate agencies" who have entered into contracts with providers. To be sure, defendant's repeated statements that the term has "a well-defined usage" without in any way specifying that usage, in conjunction with an inconsistent interpretation of the term by the very State agency charged with setting reimbursement rates, speak volumes about the depth of the controversy before this court and the vagueness of the regulation itself.

The public charge portion of the regulation also does not define "the rate" to be charged. Again, defendant claims that this term is also well defined in the Medicaid area yet no specific definition is ever provided, particularly in the area of personal care services. Moreover, no standards, guidelines or definitions were adopted relating to this term either. In this context, it is important to note that the Medicaid

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3. For example, defendant's brief states that "the regulations require that Medicaid patients be treated no worse than the man on the street who enters, seeks health care and pays 'out-of-pocket'. If the advertised — and actually charged — rate for this private, uninsured, self-pay patient is $12.00, Medicaid cannot be charged more." In another instance, however, the brief states: "[I]t is difficult to see what any 'guidelines' could add to a rule that plainly tells providers that their Medicaid compensation will never be any more than the rest of the world pays." The "rest of the world", in this passage, would plainly mean all non-Medicaid payors. Apparently, defendant's position seems to be that general public means whatever "group" of payors pays the *lowest* rate for personal care services, not the average blended rate of the entire non-Medicaid world.

rate set by DSS under the cost-based methodology for personal care services is a "blended rate". This means that the provider is reimbursed solely at one set hourly rate and no additional charges are allowed for mileage, transportation or supplies, nor is a provider allowed to charge a higher rate for services provided on a weekend or holiday. Rather, the rate set by DSS subsumes these types of additional costs, in addition to other administrative costs associated with a provider's participation in the Medicaid program, in the single approved hourly rate.

Non-Medicaid clients, on the other hand, might be charged for these items in addition to a base hourly rate for services. It is unclear under the public charge portion of the regulation if "the rate" to be charged means simply the base hourly rate charged to the "general public" or the base rate plus all other incidental charges, such as mileage, supplies, holiday differentials and the like.[4] Defendant appears to claim that the "rate charged" means the lowest hourly base rate charged to any payor group, which in this case happens to be the private, self-pay clients. Since this group of payors apparently makes up a very small percentage of the population in general (17%) and an even smaller percentage of Ulster Home's total revenue (7%), and since the hourly base rate is not the actual amount even this small group pays, the intent of the Legislature — to reimburse providers for *actual* costs — would be thwarted if a provider were reimbursed at the lowest possible base rate charged to the smallest percentage of clients.

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4. For example, it is not clear if "the rate" charged would be $12.00, assuming that this is the base hourly charge paid by a self-pay client, or $12.00 plus expenses paid by that client.

Appendix C

In the absence of any guidance, we find that providers of personal care services were in fact "left to guess" (*Doe v State of New York*, 189 AD2d 199, 210; *see, Matter of Burke v Denison*, 218 AD2d 894, 896) the meaning of the public charge portion of the regulation and the effect it may have on them by submitting bills to Medicaid at a DSS approved cost-based rate (*cf., Matter of Burke v Denison, supra*; *Matter of Prusky v Webb*, 134 AD2d 718, 720-721). "Nor can the question be solved by resort to the established canons of construction that enable a court to look through awkward or clumsy expression, or language wanting in precision, to the intent of the Legislature" (*Connally v General Constr. Co.*, 269 US 385, 394, *supra*). Here, in promulgating the regulation, DSS was silent as to its construction of the public charge portion of the regulation. Thus, to construe the rate charged to the "general public" as meaning an average of all rates charged to non-Medicaid payors, or alternatively, the lowest rate charged to any given payor who had not entered into a contract with a provider "would be as likely to defeat the purpose of the Legislature [and DSS] as to promote it" (*id.*, at 394). Thus, in the specific context of the personal care services industry, we are constrained to find that the rate charged to the "general public", in the absence of guidance or definition, is standardless (*see, City of Chicago v Morales*, 527 US 41; *see also, People v New York Trap Rock Corp.*, 57 NY2d 371, *supra*). Accordingly, we grant the petition to the extent that it seeks to have the public charge portion of the regulation declared unconstitutional. To be sure, this declaration is limited to the public charge portion of the regulation only (i.e., 18 NYCRR 505.14[h][7][ii][a][1][i]) and the remainder of the regulation remains intact.

Cardona, P.J., Peters, Graffeo and Mugglin, JJ., concur.

Appendix C

ORDERED that the order is reversed, on the law, without costs, motion granted and it is declared that 18 NYCRR 505.14(h)(7)(ii)(a)(1)(i) is unconstitutional.

ENTER:

[stamp] /s/ Michael J. Novack
Michael J. Novack
Clerk of the Court

APPENDIX D — MEMORANDUM AND ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT IN *PEOPLE v. RUBIN* DATED, DECIDED AND ENTERED APRIL 13, 2000

SUPREME COURT — APPELLATE DIVISION
THIRD DEPARTMENT

Decided and Entered: April 13, 2000

11181

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

v.

DANIEL RUBIN,

Appellant.

MEMORANDUM AND ORDER

Calendar Date: February 16, 2000

Before: Cardona, P.J., Mercure, Crew III, Peters and Mugglin, JJ.

* * *

Crew III, J.

Appeal from a judgment of the Supreme Court (Czajka, J.), rendered May 14, 1999 in Albany County, upon a verdict

convicting defendant of the crimes of grand larceny in the second degree and offering a false instrument for filing in the first degree (eight counts).

Defendant, the president of a licensed home care agency that provides personal care services to eligible Medicaid recipients, was indicted and charged with one count of grand larceny in the second degree and 10 counts of offering a false instrument for filing in the first degree stemming from the submission of allegedly false claims to Medicaid. The basis for counts one through seven was that defendant allegedly had sought reimbursement for personal care services rendered at a higher rate than charged to the general public in violation of 18 NYCRR 505.14(h)(7)(ii)(a)(1)(i). Following a jury trial, defendant was found guilty of the crimes charged in counts one through nine of the indictment and thereafter sentenced to an aggregate indeterminate term of 4⅔ to 14 years in prison and a fine of $50,000.[1] Additionally, defendant was ordered to pay restitution in the amount of $620,237.80. Defendant now appeals.

Defendant argues that his convictions of the crimes charged in counts one through seven of the indictment must be reversed inasmuch as the regulation serving as the basis for the alleged fraud is unconstitutionally vague. We agree (*see*, *Ulster Home Care v Vacco*, __ AD2d __ [decided herewith]). Defendant was charged with fraudulently certifying his compliance with 18 NYCRR 505.14(h)(7)(ii)(a)(1)(i). Inasmuch as we have held that regulation to be unconstitutional,

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1. Counts 10 and 11 were dismissed prior to trial on motion of the People.

there is nothing with which defendant need be in compliance and he therefore cannot be guilty of false certification in that regard.

With regard to counts eight and nine, defendant concedes that they are unrelated to the constitutionally infirmed regulation but asserts that there must be a reversal of each count because the evidence was legally insufficient and the verdict was against the weight of the evidence. We disagree. Based upon the record evidence, there clearly are valid lines of reasoning and permissible inferences that could lead a rational person to the conclusion reached by the jury here (*see*, *People v Bleakley*, 69 NY2d 490, 495). Likewise, viewing the record evidence in a neutral light and according deference to the jury's assessment of the witnesses, we cannot conclude that the jury failed to give the evidence the weight it should be accorded (*see*, *id.*, at 495). Defendant's remaining contentions are either academic in light of our decision regarding counts one through seven or are without merit.

Cardona, P. J., Mercure, Peters and Mugglin, JJ., concur.

ORDERED that the judgment is modified, on the law, by reversing so much thereof as convicted defendant of one count of grand larceny in the second degree and six counts of offering a false instrument for filing in the first degree; counts one through seven of the indictment are dismissed and the order of restitution is vacated; and, as so modified, affirmed.

ENTER:

Michael J. Novack
Clerk of the Court

APPENDIX E — DECISION AND ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF ULSTER DATED JUNE 21, 1999

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ULSTER

Index No.: 98-1461

ULSTER HOME CARE, INC.,

Plaintiff(s),

– against –

DENNIS VACCO, in his capacity as Attorney General of the State of New York,

Defendant(s),

MOTION DATE July 8, 1999
RJI NUMBER 55-98-00833

PRESENT: HONORABLE JOSEPH P. TORRACA,
Supreme Court Justice

The following papers number 1 to 5 read on this motion

	PAPERS NUMBERED
Notice of Motion/Affidavit(s)	1,2
Answering Affirmation(s)	3
Replying Affidavit(s)	4
Other: Memorandum of Law	5

Appendix E

Upon the foregoing papers, the request of Plaintiff, Ulster Home Care, Inc., for an order declaring that Defendant's actions to replace the reimbursement set-by contract with a "public charge" rate are in violation of the contract entered into between Plaintiff and Ulster County; prohibiting Defendant from enforcing the "public charge" regulation; prohibiting and enjoining the Defendant from demanding payment of any amounts received by Plaintiff under such contracts; and prohibiting and enjoining the Defendant from imposing criminal or civil liability against the Plaintiff, is denied in its entirety.

The key to the determination of this lawsuit is the interpretation of and the propriety of the Public Charge Regulation codified at 18 NYCRR 505.14(h)(7). The proofs offered by the parties in this regard are contrary and contradictory and, thus, raise issues which must be determined by the trial court.

This shall constitute the decision and order of the Court in this matter. All papers submitted on this motion are forwarded for filing to: TOBIN AND DEMPF, ESQS., 33 Elk Street, Albany, New York 12207

DATED: June 21, 1999
Kingston, New York

s/ Joseph P. Torraca
JOSEPH P. TORRACA
Justice of the Supreme Court

APPENDIX F — OPINION AND ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT DATED, DECIDED AND ENTERED APRIL 22, 1999

SUPREME COURT — APPELLATE DIVISION
THIRD DEPARTMENT

Decided and Entered: April 22, 1999

83571

ULSTER HOME CARE INC. et al.,

Respondents,

v

DENNIS C. VACCO, as Attorney-General of the State of New York,

Appellant.

OPINION AND ORDER

Calendar Date: February 11, 1999

Before: Cardona, P.J., Mikoll, Yesawich Jr., Carpinello and Graffeo, JJ.

* * *

Appendix F

Carpinello, J.

Appeals (1) from an order of the Supreme Court (Torraca, J.), entered June 9, 1998 in Ulster County, which, *inter alia*, granted a motion by plaintiff Ulster Home Care Inc. for a preliminary injunction and enjoined defendant from enforcing the "public charge" regulation on a retroactive basis, and (2) from an order of said court, entered July 15, 1998 in Ulster County, which found defendant in contempt of court.

Plaintiff Ulster Home Care, Inc. (hereinafter Ulster Home) is the operator of an Ulster County licenced home care agency enrolled in the Medicaid program. During the course of an audit and investigation conducted by the office of the Attorney General (hereinafter defendant), through the Medicaid Fraud Control Unit (hereinafter MFCU), it was alleged that Ulster Home had sought reimbursement for personal care services at a higher rate than charged to the general public, purportedly in violation of 18 NYCRR 505.14(h)(7)(ii). This regulation, which has consistently been referred to by Ulster Home as the "public charge" regulation, provides as pertinent here:

> (1) Medical assistance payments to personal care services providers for any rate year beginning on or after January 1, 1994, are made at the lower of the following rates:
>
> > (i) the rate the provider charges the general public for personal care services; or

> (ii) the rate determined by the department in accordance with [a cost-based methodology] (18 NYCRR 505.14[h][7][ii][a][1][i], [ii]).

Up until MFCU's investigation, Ulster Home provided services under a contract with Ulster County and was reimbursed for services rendered pursuant to the cost-based methodology.

When faced with the prospect of criminal prosecution because of its alleged violation of the public charge regulation (which would have automatically terminated it from the Medicaid program pursuant to 18 NYCRR 515.7), Ulster Home commenced this action seeking declaratory and injunctive relief. In its complaint, the constitutionality of the regulation was placed directly at issue. Specifically, Ulster Home sought to prohibit defendant or his agents from enforcing the public charge regulation on the ground that it was unconstitutionally vague and ambiguous. It also sought a declaration that prosecutorial actions in seeking to recover funds based upon the public charge limitation contravened the contract between itself and Ulster County.

On June 2, 1998, Supreme Court issued a preliminary injunction enjoining the enforcement of the public charge regulation or demanding repayment of any funds received by Ulster Home under its contract with Ulster County. The court held:

> Although it is true that the general rule is that equity will not enjoin criminal prosecutions, it is

> also true that where, as in this instance, the granting of a preliminary injunction is necessary for the protection of rights cognizable in equity and there is a danger of irreversible injury *as a result of prosecution* based on an invalid statute or administrative rule or order, such relief is available. Should [Ulster Home] be *prosecuted* as a result of the 'public Charge' regulation, immediate and irreparable injury and damage shall result to [Ulster Home] irrespective of the final outcome of the anticipated prosecution (emphasis supplied).

Notwithstanding the clear mandate of the order, MFCU submitted charges to a Grand Jury on June 23, 1998 and apparently obtained an indictment as Ulster Home's arraignment was scheduled for June 26, 1998. This conduct prompted Ulster Home to commence a contempt proceeding. Following a hearing, Supreme Court found defendant in civil contempt of the prior order. Thereafter, defendant commenced a CPLR article 78 proceeding in this Court seeking to prohibit Supreme Court's enforcement of both the order granting the preliminary injunction and the contempt order. This application was summarily denied on the ground that "writs of prohibition and mandamus do not lie to review appealable orders". In the interim, plaintiffs James Mahoney and Diane Wiegand, Ulster Home's Executive Director and Assistant Executive Director, respectively, were permitted to intervene in this action. Defendant now appeals from the order granting a preliminary injunction and the subsequent civil contempt order.

Appendix F

We address first the propriety of Supreme Court's order granting the preliminary injunction. Fundamentally, a preliminary injunction may be granted where a movant has established the likelihood of ultimate success on the merits, irreparable injury and a balancing of equities in his or her favor (*see, Aetna Ins. Co. v Capasso*, 75 NY2d 860, 862; *Doe v Axelrod*, 73 NY2d 748, 750), and a court's decision to grant same will not be disturbed absent an abuse of discretion (*see, Doe v Axelrod, supra*). Significantly, a preliminary injunction is intended to preserve the status quo during the pendency of the action (*see, Sforza v Nesconset Fire Dist.*, 184 AD2d 631, 632). The thrust of defendant's argument concerning the order granting the preliminary injunction is that Supreme Court simply lacked the authority to enjoin a criminal prosecution.[1] Specifically, defendant argues that a declaratory judgment in this case would run counter to the principle that jurisdiction over criminal matters rests solely in courts of law and may not be interfered with by courts of equity, citing *Reed v Littleton* (275 NY 150). Declaratory relief, however, is available in cases where the constitutionality or legality of a statute or regulation is in

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1. Noticeably absent from defendant's brief is any specific discussion or application of the elements necessary for a preliminary injunction or any argument that Supreme Court abused its discretion in granting same. Rather, the primary focus of the appeal from the preliminary injunction order is that Supreme Court lacked jurisdictional authority to enjoin a criminal prosecution. The failure to include any discussion or argument whatsoever concerning whether Ulster Home sufficiently established the requisite elements for a preliminary injunction warrants a conclusion that this issue has been abandoned (*see, e.g., Failla v Amodeo*, 225 AD2d 965, 967, n 3; *Rebh v Lake George Ventures*, 223 AD2d 986, 987; *Matter of Hiser v Hiser*, 175 AD2d 353, 354).

question and no question of fact is involved (*see, Dun & Bradstreet v City of New York*, 276 NY 198, 206; *see also, New York Foreign Trade Zone Operators v State Liq. Auth.*, 285 NY 272, 276; *Bunis v Conway*, 17 AD2d 207, *appeals dismissed* 12 NY2d 645, 882).

Indeed, as held by the Court of Appeals in *Reed v Littleton* (*supra*, at 153):

> Where administrative officials act under a statute which infringes the Constitution, or under rules or regulations that are invalid, a person may have the right to petition the court to determine the jural relations, and to have the invalidity of the statute rule, or regulation declared.

In *Reed v Littleton*, the statute at issue was "concededly valid" and the facts were in dispute and open to different interpretations. Here, where the constitutionality of the public charge regulation has been implicated, the nature and purpose of the regulation sought to be tested is not disputed and the only questions involved are those of law (*cf., id.*; *Snap 'N' Pops v Dillon*, 66 AD2d 219; *Toomey v Neenan*, 59 Misc 2d 787), "equity should not hesitate to define the rights of the parties" (*New York Foreign Trade Zone Operators v State Liq. Auth., supra*, at 278). Thus, we find no basis to disturb the order granting injunctive relief.

We next address the more serious issue before this Court; namely, whether, based on MFCU's actions, defendant was properly found to be in civil contempt. "To sustain a civil contempt, a lawful judicial order expressing an unequivocal

mandate must have been in effect and disobeyed * * * [and] the party to be held in contempt must have had knowledge of the order" (*McCain v Dinkins*, 84 NY2d 216, 226 [citations omitted]; *see*, *Matter of Department of Envtl. Protection of City of N.Y. v Department of Envtl. Conservation of State of N.Y.*, 70 NY2d 233, 240; *Matter of McCormick v Axelrod*, 59 NY2d 574, 583). It must further appear that the offending conduct has prejudiced the complaining party (*see*, *McCain v Dinkins*, *supra*). In our view, Supreme Court was justified in holding defendant in contempt.

First, Supreme Court's order could not have been any clearer in prohibiting the criminal prosecution of Ulster Home. Supreme Court explicitly found that enjoining criminal prosecution under the public charge regulation was necessary to protect Ulster Home's equitable rights and to avoid irreversible injury to it "*as a result of prosecution*" (emphasis supplied). Once this injunction was issued, MFCU was not without adequate legal options; it could have moved to reargue before Supreme Court (*see*, CPLR 2221), moved for a modification of the preliminary injunction from this Court (*see*, CPLR 5518) or applied for a stay of enforcement pending appeal (*see*, CPLR 5519[c]). Until judicial relief to stay or vacate the order was successfully obtained, defendant was duty-bound to honor it. This was not done.

In support of the conduct, two purported justifications are offered. First, it is claimed that defendant did not know that the injunction prohibited the enforcement of the public charge regulation. It is also claimed that the order was vague because of an obvious typographical error by Supreme Court

in its citation to the public charge regulation.[2] These contentions are patently without merit.[3] Upon review of the injunction papers and Supreme Court's order, this Court is left with no doubt whatsoever that defendant knew the substance of the preliminary injunction concerned the public charge regulation — 18 NYCRR 505.14(h)(7)(ii) — and the resulting order prohibited further prosecution pending resolution of the proceeding.

Nor did filing a notice of appeal from that order invoke the automatic stay provisions of CPLR 5519(a)(1), thereby cloaking defendant with legal protection from the subsequent contempt. We reject the claim that a good-faith basis existed to support indicting Ulster Home based on this statutory provision since there is recent decisional authority firmly establishing that no automatic stay is available by appealing — either as of right or by permission — from an order or judgment which prohibits certain conduct (*see*, *State of New York v Town of Haverstraw*, 219 AD2d 64, 65-66; *see also*, *Matter of Oliver v County of Broome*, 136 AD2d 793, 795).[4] As noted in *State of New York v Town of Haverstraw* (*supra*), a prohibitory injunction, which "operates to restrain the

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2. Instead of referring to 18 NYCRR 505.14(h)(7)(ii), the court referred to 18 NYCRR 505.14(h)(7)(i).

3. To this end, even if the order was somehow ambiguous, which it is not, defendant could have sought clarification from Supreme Court before presenting his case to the Grand Jury. He did not do so.

4. Significantly, defendant was a party in *State of New York v Haverstraw* (*supra*).

commission or continuance of an act and to prevent a threatened injury, thereby ordinarily having the effect of maintaining the status quo", is not automatically stayed under CPLR 5519(a)(1).

Fundamentally, the objectives of a preliminary injunction and the automatic stay provision of CPLR 5519(a)(1) are similar — to maintain the status quo pending resolution of an action and an appeal, respectively (*compare*, *Sforza v Nesconset Fire Dist.*, 184 AD2d 631, 632, *supra*; *Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp.*, 70 AD2d 1021, 1022, *with State of New York v Town of Haverstraw*, *supra*; *Matter of Oliver v County of Broome*, *supra*). To countenance defendant's position that CPLR 5519(a)(1) permitted a criminal prosecution to go forward in its ordinary course would hardly maintain the status quo and indeed make any decision in plaintiffs' favor in the underlying action barren. Moreover, the attempt to sidestep the holding of *State of New York v Town of Haverstraw* (*supra*) by characterizing Supreme Court's order as not "purely prohibitory" can charitably be characterized as unpersuasive.

Defendant's remaining contentions have been considered and rejected.

Appendix F

Cardona, P.J., Mikoll, Yesawich Jr. and Graffeo, JJ., concur.

ORDERED that the orders are affirmed, with costs.

ENTER:

[stamp] /s/ Michael J. Novack
Michael J. Novack
Clerk of the Court

APPENDIX G — DECISION AND ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT ON MOTION DATED, DECIDED AND ENTERED SEPTEMBER 9, 1998

SUPREME COURT — APPELLATE DIVISION
THIRD JUDICIAL DEPARTMENT

Decided and Entered: September 9, 1998

Case #: 82669A
82669B

In the Matter of DENNIS C. VACCO, as Attorney-General of the State of New York,

Petitioner,

v

JOSEPH P. TORRACA, as Justice of the Supreme Court, Ulster County, et al.,

Respondents.

(And Another Related Proceeding.)

DECISION AND ORDER ON MOTION

Motion by petitioner for a stay pending determination of the proceedings and for further relief.

Appendix G

Motion by respondent Ulster Home Care Inc. for a stay pending determination of the proceedings.

Motion by respondents Ulster Home Care Inc. and Competent Care Inc. to dismiss the proceedings and for further relief.

Cross motion by respondents Diane Wiegand and James Mahoney to dismiss the proceedings.

Upon the papers filed in support of the motions and cross motion and the papers filed in response thereto, it is

ORDERED that the motion and cross motion to dismiss the proceedings are granted, without costs, upon the ground that writs of prohibition and mandamus do not lie to review appealable orders (*see*, *Matter of Branciforte v Spanish Naturopath Socy.*, 217 AD2d 619; *see also*, CPLR 7801[2]; *Matter of Veloz v Rothwax*, 65 NY2d 902). It is further

ORDERED that the motions for stays and for further relief are denied, without costs, as academic.

CARDONA, P.J., WHITE, SPAIN, CARPINELLO and GRAFFEO, JJ., concur.

ENTER:

[stamp] /s/ Michael J. Novack
Michael J. Novack
Clerk of the Court

APPENDIX H — DECISION AND ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF ULSTER DATED JULY 9, 1998

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ULSTER

ULSTER HOME CARE, INC.,

Plaintiff(s),

– against –

DENNIS VACCO, in his capacity as Attorney General of the State of New York,

Defendant(s),

DECISION/ORDER

MOTION DATE June 29, 1998
RJI NUMBER 55-98-00833

PRESENT: HONORABLE JOSEPH P. TORRACA,
Supreme Court Justice

The following papers number 1 to 4 read on this motion

	PAPERS NUMBERED
Order to Show Cause/Affidavits	1,2
Answering Affirmations	3
Replying Affidavits	4

Upon the foregoing papers, the Court finds the Defendant in civil contempt of the Order of this Court dated June 2,

1998 in that the directive therein granting a preliminary injunction enjoining such Defendant from enforcing the "public charge" regulation codified at 18 NYCRR 505.14(h)(7)(i) on a retroactive basis. More specifically, Defendant violated this Court's order by seeking the indictment of Ulster Home Care, Inc. before a Grand Jury on June 23, 1998 in violation of the injunction in the aforesaid order.

Said Defendant and his agents may purge themselves from the aforesaid contempt by refraining from continuing with the aforesaid indictment be unsealing same and making the charges therein available to the public and, in brief, by refraining from proceeding any further with the aforesaid criminal proceedings until such time as the aforesaid injunction shall be removed by this Court.

In the event that the Defendant fails to purge himself as provided herein, the Defendant may apply ex-party to this Court upon proof by affidavit of Defendant's failure to purge himself and provided herein, for an order directing that the Defendant be punished for the aforesaid contempt.

This shall constitute the decision and order of the Court in this matter. All papers submitted on this motion are forwarded for filing to: TOBIN & DEMPF, ESQS., 33 Elk Street, Albany, New York 12207.

DATED: July 9, 1998
Kingston, New York

s/ Joseph P. Torraca
JOSEPH P. TORRACA
Justice of the Supreme Court

APPENDIX I — DECISION AND ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF ULSTER DATED JUNE 2, 1998

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ULSTER

ULSTER HOME CARE, INC.,

Plaintiff(s),

– against –

DENNIS VACCO, in his capacity as Attorney General of the State of New York,

Defendant(s),

DECISION/ORDER

MOTION DATE May 28, 1998
RJI NUMBER 55-98-00833

PRESENT: HONORABLE JOSEPH P. TORRACA,
Supreme Court Justice

The following papers number 1 to 7 read on this motion

	PAPERS NUMBERED
Order to Show Cause/Affidavits	1,2
Answering Affirmations	3
Replying Affidavits/Surreply	4,7
Other: Memorandum of Law	5,6

Upon the foregoing papers, the motion of Plaintiff, Ulster Home Care, Inc., for a preliminary injunction is granted in its entirety.

Appendix I

Although it is true that the general rule is that equity will not enjoin criminal prosecutions, it is also true that where, as in this instance, the granting of a preliminary injunction is necessary for the protection of rights cognizable in equity and there is a danger of irreversible injury as a result of prosecution based on an invalid statute or administrative rule or order, such relief is available. Should the Plaintiff be prosecuted as a result of the "public Charge" regulation, immediate and irreparable injury and damage shall result to Plaintiff irrespective of the final outcome of the anticipated prosecution.

During the pendency of this action, Defendant, Dennis C. Vacco, Attorney General of the State of New York, is enjoined from enforcing the "public charge" regulation codified at 18 N.Y.C.R.R. 505.14(h)(7)(i) on a retroactive basis and is further enjoined from demanding payment of any amounts received by Plaintiff under its contract with the County of Ulster.

This shall constitute the decision and order of the Court in this matter. All papers submitted on this motion are forwarded for filing to: TOBIN & DEMPF, ESQS., 33 Elk Street, Albany, New York 12207.

DATED: June 2, 1998
Kingston, New York

s/ Joseph P. Torraca
JOSEPH P. TORRACA
Justice of the Supreme Court

Supreme Court, U.S.
FILED
NOV 7 2001

No. 01-248

IN THE

Supreme Court of the United States

ULSTER HOME CARE INC., *et al.*,

Petitioners,

-and-

DANIEL RUBIN,

Petitioner,

v.

ELIOT SPITZER,
as Attorney General of the State of New York,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE NEW YORK COURT OF APPEALS

BRIEF IN OPPOSITION

Of Counsel:

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QUESTIONS PRESENTED

1. Whether the orders of the New York Court of Appeals in these two connected cases involving a facial vagueness challenge to a state regulation — in one of which the court remitted the case to a lower court for consideration of additional facts and issues not raised in the Court of Appeals, and in the other of which litigation over both a preliminary injunction and an "as applied" challenge to the regulation is likewise ongoing — are unreviewable under 28 U.S.C. § 1257 because they are not final judgments?

2. Whether, in reviewing (a) a conviction for offering a false instrument for filing and larceny by false pretenses and (b) an action to enjoin a prosecution for the same offenses, the court below applied the correct standard in rejecting a facial vagueness challenge to the state regulation underlying both the conviction and potential prosecution?

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Daniel Rubin ("Rubin") and Ulster Home Care Inc. and two of its executives ("Ulster") have asked this Court to review two decisions issued by the New York Court of Appeals, New York's court of last resort. Rubin seeks to overturn an affirmance of his criminal convictions for grand larceny and offering a false instrument for filing. Ulster seeks to overturn a denial of declaratory relief that would preclude a prosecution under the same statutes. Petitioners' primary argument is that the Court of Appeals applied the incorrect constitutional standard in evaluating for vagueness an administrative Medicaid regulation that informs the larceny conviction of Rubin and the potential prosecution of Ulster. According to petitioners, the legal standard for reviewing non-First Amendment facial challenges on vagueness grounds has produced conflicting decisions and should be clarified.

The petition should be denied. First, this Court lacks jurisdiction because both decisions by the Court of Appeals are non-final. Second, review is not warranted because the Court of Appeals employed the very constitutional test that petitioners urge is correct and in no way erred in applying this Court's precedents.

OPINIONS BELOW

The opinion of the New York Court of Appeals in *People v. Rubin*, Pet. App. at 6a-10a, is unreported. The opinion of the court in *Ulster Home Care, Inc. v. Vacco*, Pet. App. at 1a-5a, is reported at 96 N.Y.2d 505.

ADDITIONAL STATUTES INVOLVED

Rubin and Ulster omitted from their petition the New York Penal Law provisions that were the subject of the grand jury investigation and petit jury conviction:

Penal Law § 155.05 (Larceny; defined)

1. A person steals property and commits larceny when, with intent to deprive another of property or to appropriate the same to himself or to a third person, he wrongfully takes, obtains or withholds such property from an owner thereof.

2. Larceny includes a wrongful taking, obtaining or withholding of another's property, with the intent prescribed in subdivision one of this section, committed in any of the following ways: (a) By conduct heretofore defined or known as common law larceny by trespassory taking, common law larceny by trick, embezzlement, or obtaining property by false pretenses . . . .

Penal Law § 155.40(1) (Grand larceny in the second degree)

A person is guilty of grand larceny in the second degree when he steals property and when . . . [t]he value of the property exceeds fifty thousand dollars . . . .

Penal Law § 175.35 (Offering a false instrument for filing in the first degree)

A person is guilty of offering a false instrument for filing in the first degree when, knowing that a written instrument contains a false statement or false information, and with intent to defraud the state or any political subdivision, public authority or public benefit corporation of

> the state, he offers or presents it to a public office, public servant, public authority or public benefit corporation with the knowledge or belief that it will be filed with, registered or recorded in or otherwise become a part of the records of such public office, public servant, public authority or public benefit corporation.

COUNTERSTATEMENT OF THE CASES

Two cases are presented here for review, each implicating a prosecution under penal laws of general applicability in New York State — the statutes prohibiting larceny and offering a false instrument for filing. Rubin was convicted after a jury trial, and the Court of Appeals has upheld the conviction and remitted the case for consideration of other issues not addressed by the intermediate appellate court. Ulster was the subject of a criminal investigation until it brought a civil action seeking declaratory judgment and injunctive relief staying any prosecution or enforcement action. The trial court granted Ulster a preliminary injunction on the basis of its vagueness challenge, but later denied its motion for summary judgment seeking declaratory relief. Only the summary judgment decision was appealed, and the Court of Appeals has now upheld the denial of summary judgment and remitted the case for further proceedings.

The gravamen of both offenses was larceny from the Medicaid program by false pretense — specifically, by deceitful overbilling. Both petitioners defended by challenging as facially vague the underlying Medicaid administrative regulation that sets forth the billing standard. That regulation provides in pertinent part: "Medical assistance payments . . . are made at the lower of the following rates: (i) the rate the

provider charges the general public for personal care services; or (ii) the rate determined by the department . . . ." N.Y. Comp. Codes R. & Regs. tit. 18, § 505.14(h)(7)(ii)(a)(1) (2001).

This regulation embodies a basic rule of the Medicaid program: that a provider may not charge the government a higher fee for services than it charges the general public. This rule, known as the "public charge" rule, exists to prevent providers from exploiting the public fisc by charging the state at above-market rates. The theory of both cases was that the petitioners charged Medicaid higher rates than it charged self-paying patients, and made a series of false written statements to execute and conceal the overbilling.

In motion practice and as a factual "intent" defense at trial, petitioners argued that the vagueness of the regulation precluded a determination that they intended to commit fraud. Specifically, petitioners attacked as vague the word "rate" and the phrase "the general public." New York's intermediate appellate court agreed with petitioners, finding the regulation unconstitutionally vague on its face, reversing six counts of Rubin's eight counts of conviction, and granting summary judgment to Ulster on its declaratory relief action.

The Court of Appeals reversed the intermediate court in both cases. In *Rubin*, the court affirmed the convictions. Noting that it had already declared the public charge regulation "facially valid" in *Ulster*, Pet. App. at 8a, the court proceeded also to find that the regulation was not impermissibly vague "[a]s applied to" Rubin. Pet. App. at 9a. The court based this conclusion on, among other things, evidence that Rubin "understood the public charge regulation and yet created schemes to conceal his violation of it" and

"instructed his staff" to engage in specific falsehoods. Pet. App. at 9a. Litigation is ongoing in this case. The Court of Appeals remitted for the Appellate Division to resolve undetermined questions of fact and law. After the Appellate Division did so, Rubin sought both reargument in the intermediate court and leave to appeal in the Court of Appeals. Both of these applications are pending.

In *Ulster*, the court reversed the grant of summary judgment to petitioner. It held that the regulation was not unconstitutionally vague on its face because it could be understood by "a person of ordinary intelligence" and was not amenable to arbitrary enforcement. Pet. App. at 4a. The court additionally noted that Ulster was not subject to prosecution for violating the regulation, but rather for larceny and offering a false instrument for filing. Unlike the administrative regulation itself, these felonies have a statutory requirement that a defendant engage in "a knowing attempt to deceive or defraud." Pet. App. at 4a-5a. Plaintiffs therefore were not entitled to summary judgment absent a showing "that the regulation was unconstitutional as applied to them." Pet. App. at 4a. Although the preliminary injunction was not brought up for review, the Court of Appeals nonetheless opined that "it was error to enjoin [Ulster's] criminal prosecutions." Pet. App. at 5a. The court remitted the case to the trial court for further proceedings. It did not vacate the preliminary injunction, which remains fully in effect and, as with the proceedings in *Rubin*, is the subject of an ongoing appeal.

REASONS FOR DENYING THE WRIT

This Court should decline review for two reasons. First, neither *Rubin* nor *Ulster* has produced a final judgment and therefore jurisdiction does not lie pursuant to 28 U.S.C. § 1257. Second, even if these judgments were final, petitioners have misstated their holdings in order to suggest a conflict where none exists. In fact, the Court of Appeals applied precisely the constitutional test that petitioners urge is correct. Thus, even if there were a doctrinal split on this issue, it would not be implicated in these cases.

I. THIS COURT LACKS JURISDICTION BECAUSE NEITHER *RUBIN* NOR *ULSTER* IS A FINAL JUDGMENT.

Pursuant to 28 U.S.C. § 1257(a), this Court may review state court decisions only with respect to "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . . ." Because neither *Rubin* nor *Ulster* has produced a final judgment, this Court lacks jurisdiction and petitioners' application must be denied.

In *Rubin*, the Court of Appeals remitted the case to the Appellate Division for consideration of the facts and issues raised but not determined on the appeal to that court. Pet. App. at 10a. Those issues, which include a challenge to the sufficiency of the evidence, remain unresolved. After the Appellate Division addressed them in an August 30, 2001 decision, *see People v. Rubin*, 729 N.Y.S.2d 561 (3d Dept. 2001), petitioner made two additional applications: (1) a motion for reargument in the Appellate Division and (2) a motion for leave to appeal in the Court of Appeals. Both applications are pending, and, as a consequence, *Rubin* is not final.

Ulster, in which the Court of Appeals upheld denial of a summary judgment motion, is also non-final because litigation continues over both the "as applied" challenge and the preliminary injunction initially issued by the trial court. Observing that the Appellate Division's earlier affirmance of the preliminary injunction was "not brought up for review," Pet. App. at 3a n.2, the Court of Appeals remitted the case to Supreme Court, Ulster County for further proceedings, Pet. App. at 5a. The State moved to vacate the preliminary injunction, and its motion was granted by order of the Supreme Court on August 10, 2001. Ulster then moved in the Appellate Division for a stay of that order pending appeal, arguing that the injunction is law of the case and should remain in effect while Ulster's "as applied" claim is resolved. Ulster was granted a stay on September 21, 2001, but has not yet perfected its appeal. Thus, litigation on petitioner's "as applied" challenge remains pending, the injunction against enforcement remains in place, and petitioners are still prosecuting an appeal. This is precisely the situation faced by the petitioner in *Florida v. Thomas*, 532 U.S. 774 (2001), where this Court dismissed a case for lack of jurisdiction because, in further proceedings, the petitioner might yet prevail on a separate, related constitutional ground, thereby mooting the need for review of the issue on which certiorari had been granted.

Even if *Ulster* were considered to be final, strong prudential reasons would dictate that review by this court would be premature. Too many issues are still abstract and the question of the interplay between the facts and New York's statutes remains wholly unresolved. *See Rescue Army v. Municipal Court*, 331 U.S. 549, 574-85 (1947) (although judgment was final, Court declines to exercise jurisdiction in writ of prohibition action because issues are abstract and

speculative, and interdependent statutory provisions not yet clearly interpreted). Here, before there can even be a trial, there must first be either a presentation of competent admissible evidence to a New York State grand jury followed by the grand jury's decision to vote a true bill, *see* N.Y. Crim. Proc. Law art. 190 (McKinney 1993), or reinstatement of the previously dismissed indictment, *see* N.Y. C.P.L.R. § 2221(e)(2) (McKinney 1991 & Supp. 2001) (motion for leave to renew); N.Y. C.P.L.R. § 5015(a)(5) (McKinney 1992) (relief from judgment or order). If one of these events occurs, then — under the rule set forth by the Court of Appeals in the *Rubin* case — Ulster may still challenge the vagueness of the regulations, both in pretrial motions to dismiss on constitutional "as applied" grounds and as a factual intent defense at trial.

II. NOTWITHSTANDING PETITIONERS' MISCHARACTERIZATION OF THE DECISIONS BELOW, THE COURT OF APPEALS DID NOT ERR IN APPLYING THIS COURT'S PRECEDENTS.

Petitioners contend that this Court should grant certiorari to resolve a purported conflict about the standard for reviewing vagueness challenges that do not implicate the First Amendment. Yet the Court of Appeals applied exactly the standard that petitioners propose in their application to this court. Petitioners' additional objections to the decisions below — that the Court of Appeals has insulated all criminal prosecutions from vagueness challenges and failed to apply a case involving a vagueness challenge to another statute — are similarly without merit.

A. The Court of Appeals applied precisely the test for vagueness that petitioners assert is correct.

The supposed conflict in this Court's jurisprudence that is the basis of the petition is not implicated by these cases. Petitioners ask this Court to grant certiorari because they assert that the Court of Appeals failed to apply the standard set forth in *Chicago v. Morales*, 527 U.S. 41 (1999), for a facial constitutional challenge for vagueness. Petitioners claim that the Court of Appeals instead applied the more stringent rule set forth in *United States v. Salerno*, 481 U.S. 739 (1987). The flaw in petitioners' argument is that the court did not apply the *Salerno* test, but rather the more liberal *Morales* formulation that they assert is correct.

In *Morales*, this Court held that "[v]agueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement." *Morales*, 527 U.S. at 56 (citation omitted). A more recent decision, ignored by petitioners, is to the same effect:

> A statute can be impermissibly vague for either of two independent reasons. First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement.

Hill v. Colorado, 530 U.S. 703, 732 (2000) (citing *Morales*, 527 U.S. at 56-57).

Petitioners assert that the Court of Appeals' failure to apply the more generous *Morales* test was error. Their argument depends on the contention that the New York Court of Appeals applied not this test, but a more stringent standard set forth in *Salerno*, 481 U.S. at 745, under which the challenger must establish "that no set of circumstances exists under which the Act would be valid." In fact, contrary to petitioners' assertions, the Court of Appeals applied the *Morales/Hill* test. It concluded that petitioners' challenge failed to satisfy either part of that test. The court held: "Neither the term 'general public' nor 'rate' as used in the regulation is so vague that it could not be understood by a person of ordinary intelligence or could be arbitrarily enforced." Pet. App. at 4a.

Because the Court of Appeals employed the test petitioners concede is proper, this case is an inappropriate vehicle for resolving any alleged split between *Morales/Hill* and *Salerno*.

B. The Court of Appeals did not hold that State regulations are immune to vagueness challenges in criminal prosecutions, but instead reviewed and upheld the regulation at issue.

The Court of Appeals did not hold, as petitioners suggest, that regulations "may not even be tested for vagueness" in a criminal prosecution. Pet. at 23. Petitioners suggest that the court applied *Bryson v. United States*, 396 U.S. 64 (1969), as "a bar to judicial review of certifications [of regulatory compliance] which incorporate by reference vague legal provisions." Pet. at 23. The court, however, not only reviewed the public charge regulation for facial vagueness, but also explicitly allowed defendants to challenge the regulations "as applied to them." Pet. App. at 4a; *see also id.* at 9a. Thus,

the Court of Appeals' supposed failure to permit a vagueness challenge to the regulation cannot support a grant of certiorari.

Even if the Court of Appeals had not fully considered petitioners' vagueness challenge — which it plainly did — the court would have correctly concluded that, in a case alleging deliberate deceit as a means of self-help, a defendant cannot "escape the consequences by urging that his conduct be excused because the statute which he sought to evade is unconstitutional." Pet. App. at 5a (quoting *Bryson v. United States*, 396 U.S. 64, 68). This Court has repeatedly held that when an indictment charges a defendant with lying to evade a statutory requirement, "a claim of unconstitutionality will not be heard to excuse a voluntary, deliberate and calculated course of fraud and deceit." *Bryson*, 396 U.S. at 68 (refusing to adjudicate, *inter alia*, vagueness challenge to conviction for making a false statement in affidavit filed to comply with requirement of National Labor Relations Act). Where there is "an effort to circumvent the law and not to challenge it — a purported compliance with the statute designed to avoid the courts, not to invoke their jurisdiction" — it "is no defense to a charge based upon this sort of enterprise that the statutory scheme sought to be evaded is somehow defective." *Dennis v. United States*, 384 U.S. 855, 865-66 (1966).

Petitioners here seek to do precisely what precedent prohibits — to elude prosecution under New York's statutes regarding larceny and the offering of false instruments by alleging that the regulation that they evaded through intentional falsehoods is defective. The Court of Appeals properly noted that such an attempt to circumvent the law bars any injunction of the underlying criminal proceedings on vagueness grounds. Pet. App. at 5a.

C. The Court of Appeals did not ignore controlling precedent.

Contrary to petitioners' contentions, the decisions of the New York Court of Appeals are far from "flatly contrary," Pet. at 27, to this Court's decision in *Connally v. General Construction Co.*, 269 U.S. 385 (1926). Indeed, *Connally* reflects the common-sense proposition that the outcome of a vagueness challenge to one statute cannot be dispositive of a challenge to another statute with different terms: "The precise point of differentiation [between vague and valid statutory terms] in some instances is not of easy statement." *Id.* at 391. A determination that the terms "current rate of wages" and "locality" are impermissibly vague, *see id.* at 393-95, sheds little light on whether the terms in New York's public charge regulation can be reasonably understood or permit arbitrary enforcement.

Moreover, *Connally* itself notes that this Court has upheld statutes that "employ[ ] words or phrases having a technical or other special meaning, well enough known to enable those within their reach to correctly apply them." *Id.* (citing *Hygrade Provision Co. v. Sherman*, 266 U.S. 497, 502 (1925)). The Court of Appeals held that the public charge regulation uses exactly such phrases: The regulation "has a common understanding and is used in other State Medicaid and Medicare programs." Pet. App. at 4a (citation omitted). Petitioners' disagreement about whether the language of the regulation is indeed commonly understood by home personal care providers is a fact-bound question not worthy of review by this Court. Regardless, as discussed above, *see supra* at 9-10, petitioners cannot rely on a vagueness challenge to escape the consequences of deliberate misstatements intended to evade relevant regulatory requirements.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

ULSTER HOME CARE INC., *et al.*,

Petitioners,

-and-

DANIEL RUBIN,

Petitioner,

v.

ELIOT SPITZER,
as Attorney General of the State of New York,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE NEW YORK COURT OF APPEALS

BRIEF OF THE NEW YORK STATE ASSOCIATION OF HEALTH CARE PROVIDERS, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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PRELIMINARY STATEMENT AND INTEREST OF *AMICUS CURIAE*

The New York State Association of Health Care Providers, Inc. ("HCP") submits this *amicus curiae* brief in support of Ulster Home Care, Inc. ("Ulster Home Care" or "UHC"), petitioner in this application for a Writ of Certiorari to the New York Court of Appeals. HCP is a not-for-profit industry association representing the interests of over 600 licensed home care services agencies, certified home health agencies, long-term home health care programs, and hospice service providers throughout New York State.[1] As set forth below, the New York State Attorney General's numerous attempts, since 1998, to prosecute UHC based solely on his interpretation of an administrative regulation promulgated by the Department of Social Services ("DSS"), 18 N.Y.C.R.R. § 505.14(h)(7)(ii) ("Regulation"), violates public policy, legislative intent, and the express regulatory purpose underlying the Regulation. HCP respectfully submits that this Court should grant certiorari to review the New York State Court of Appeals Opinion reversing the Supreme Court Appellate Division, Third Department's Order reversing the lower Court's denial of UHC's motion for summary judgment.

STATEMENT OF FACTS

A. This Litigation

HCP incorporates herein by reference the Statement of the Case set forth in Petitioner UHC's brief on pages 2-9.

B. Personal Care Program

Under the Medicaid personal care program, the federal government, State and counties share the costs involved in providing personal care to Medicaid-eligible needy citizens. Personal care services are generally provided by certain home

1. The parties have consented to the filing of this brief. Their letters of consent are being lodged herewith. This brief has been authored in its entirety by undersigned counsel for the *amicus curiae*. No person or entity, other than the named *amicus curiae* and its counsel, made any monetary contribution to the preparation and submission of this brief.

care agencies ("providers") which contract with local governments to provide services to Medicaid beneficiaries.[2]

(a) 1990 Legislation

Prior to the 1990 legislation, each of the State's counties negotiated all personal care contracts with providers serving its Medicaid populations. While the State had the authority to disapprove, and thereby undo, the contracts entered into by the counties and the providers, the State routinely: (1) failed even to indicate its approval or disapproval of the contract until one to two years after submission; and (2) failed to make timely reimbursements — sometimes for as long as two years after services were rendered.

To remedy these problems, in 1990, the Legislature mandated a more equitable and consistent reimbursement scheme by enacting Chapter 53 of the Laws of 1990. The Legislature mandated, *inter alia*, that DSS (in consultation with personal care providers, local departments of social services and a panel of independent economists) prepare and submit a plan containing criteria for implementation of a rate setting methodology for personal care services. This rate setting methodology was required to consider, at minimum: (1) changes in the cost of living; (2) applicable minimum wage laws; (3) changes in pertinent economic indicators published by the federal government; (4) administration, operation and clinical factors; (5) the cost of training personal care workers; and (6) the development of a rate year that coincided with the calendar year.

(b) 1994 Regulations

In accordance with the legislative mandate set forth in the new statute, DSS promulgated a comprehensive set

2. Approximately 90% of the recipients of personal care services in New York State are elderly, disabled and/or ill, and 10% are children with disabilities, congenital problems, and chronic illnesses. The personal care client population has grown in size as well as in need. This change has been triggered, in part, by the changes in hospital reimbursement in the 1980s and 1990s that resulted in hospitals discharging patients earlier than before.

of regulations which became effective on January 1, 1994. In essence, DSS decided to replace negotiated rates with rates which would reflect providers' *actual costs* for personal care services. As compared to the prior, negotiated rates, these rates were intended to be more uniform and consistent throughout the State.

The regulations promulgated by DSS specified that personal care providers be reimbursed at the lower of: (1) their charge to the general public for personal care services; or (2) the rate for such services determined by DSS using the cost-based methodology set forth in the regulations. While the phrase "charge to the general public" is referenced in one place in the regulations, there is no definition of the phrase. Moreover, during the three year period when various methodologies were considered, the "general public" charge was given no focus. In sharp contrast, the second prong, pertaining to the rate determined by DSS, was discussed in minute detail and is the subject of a comprehensive methodology set forth at length in 18 N.Y.C.R.R. § 505.14(h)(7). Indeed, prior to the Attorney General's application of the "general public" charge, that standard had never been defined. Since the regulations went into effect on January 1, 1994, DSS has uniformly applied the rate reimbursement methodology to assess providers' actual costs and to determine the appropriate Medicaid reimbursement rate.

(c) HCP's Members and Clients

Approximately 70% of HCP's members provide personal care services to Medicaid recipients. In addition, these agencies typically provide personal care services to two other groups: (1) other public and private agencies under subcontract;[3] and (2) private pay clients.

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3. Personal care providers subcontract with state agencies, adult homes, assisted living facilities, long-term home health care programs and the statutory Expanded In-Home Services for the Elderly Program. Notably, DOH has determined that these subcontracts may be negotiated by providers at rates *lower* than their Medicaid rates.

The private pay clients served by HCP's members generally consist of uninsured individuals. Although some private pay clients have the financial resources necessary to pay the full published rates, the majority of private pay clients, however, are simply unable to do so. This group of clients consists primarily of individuals who do not qualify for Medicaid, but nevertheless, lack adequate financial resources. In the parlance of public assistance, these individuals are known as the "working poor."[4]

The services provided to Medicaid and self-pay clients and, thus, the reimbursement rate, are distinctly different, in the following ways: (1) self-pay clients receive services that are different in kind and quantity from those provided to Medicaid clients; (2) some self-pay clients actually pay *more* for services received than Medicaid does; (3) Medicaid requires a unique administrative overlay that raises the cost of services provided to Medicaid beneficiaries[5]; and (4) self-pay individuals are able to select the services they need, without regard to Medicaid requirements.[6]

---

4. Across the State of New York, the personal care services provided to these groups tend to fall into the following percentage ranges: 65% - Medicaid personal care recipients, 30% - subcontracts for personal care, and 5% - private pay/self pay. It is not uncommon, however, for providers in New York State to provide 95% of their personal care services to Medicaid recipients, with only 5% going to self-pay clients.

5. Under the 1994 regulations, Medicaid personal care providers are required, by definition, to undertake considerable additional administrative and management obligations.

6. It impossible to fairly compare Medicaid charges to the charges paid by self-pay clients. There are many items of cost associated with participation in the Medicaid personal care program that simply do not exist with self-pay clients (i.e., certain levels of case coordination and nursing supervision, additional staff to coordinate case management with the counties, preparation of annual cost reports and other regulatory compliance documentation, employee training, and compliance with health and safety standards — none of which are required for self-pay clients). In addition, Medicaid bundles all costs into one all-inclusive

(Cont'd)

Private pay rates cover a variable spectrum ranging from the rates paid by individuals who are capable of paying the full published rates, to individuals who have a compelling need for personal care but no means to pay. Some clients pay for services on a "sliding scale" basis, paying as much as they can afford for the services they need. In addition, providers often have a charitable mission or purpose that mandates that they provide services to persons in need below the cost of providing them. The limited number of self-pay clients, as well as the often limited nature of the services provided, allow providers to extend personal care services to those in need without suffering significant financial detriment.

ARGUMENT

I.

THE ATTORNEY GENERAL'S UNPRECEDENTED APPLICATION OF A "PUBLIC CHARGE" REIMBURSEMENT RATE IS IMPERMISSIBLE AND UNDERMINES THE PURPOSE AND INTENT OF THE STATUTE, REGULATIONS AND NEW YORK STATE PUBLIC POLICY

Throughout the last 30 years, the New York State Legislature has repeatedly and consistently pronounced its commitment to provide essential health services for those in need:

> Medical assistance for needy persons is hereby declared to be a matter of public concern and a necessity in promoting the public health and welfare and for promoting the state's goal of making available to everyone, regardless of race, age, national origin or economic standing, uniform, high-quality medical care.

(Cont'd)
rate. Self-payers are able to select specific, limited services, and will typically select only the services that are essential to them. Medicaid clients typically use more services because, among other things, there is no cost to do so.

See Social Services Law § 363 (as enacted in 1966); *see also* Social Services Law §§ 363-a, 365-a.

In 1977, the Legislature explicitly recognized the vital role that home health care services play in the health care delivery system when it passed legislation creating certified home health agencies. At that time, the Legislature declared that provision of "high-quality home care services to residents of New York is a priority concern" and unequivocally articulated a commitment to home care services provision and expansion. *See* Public Health Law § 3600 (reproduced at Appendix A).

As discussed below, both the Legislature and DSS (now DOH), the administrative agency to which the State specifically delegated policymaking authority and directives, made clear their intention to establish an equitable cost-based reimbursement methodology for personal care reimbursement rates. By his criminal prosecution of UHC, the Attorney General has sought to apply a contrary, unprecedented, and legally unfounded, interpretation of the appropriate standard for Medicaid reimbursement to UHC. The Attorney General's unilateral interpretation of a regulation not of his making, contravenes the clear intent of both the Legislature and DSS, as well as New York State's public policy supporting development and expansion of personal care services and will have a devastating impact on personal care providers and the individuals to whom personal care services are provided.

A. The Attorney General's Interpretation Violates The Legislature's Intent.

In 1990, the New York State Legislature mandated DSS to develop and establish a rate reimbursement methodology for personal care services. The Legislature expressly instructed DSS to work in consultation with personal care providers, local departments of Social Services and a panel of independent economists to submit "a plan containing the criteria for the establishment of a rate setting methodology for personal care services. . . ." L. 1990, ch. 53.

The five factors stated by the Legislature, *see* Statement of Facts (B)(a), *supra*, at 2, gave DSS a directive on which to develop the personal care rate reimbursement methodology — a methodology that is based on providers' actual costs. When the Legislature's mandate was fulfilled in 1993 by DSS's promulgation, DSS confirmed that the Legislature intended that the rate setting methodology consider the providers' actual costs for services:

> The Legislature's general objective in enacting Chapter 53 of the Laws of 1990 was to require the Department to develop a rate setting methodology for personal care services that considers personal care service providers' *actual costs* of providing services to [Medicaid] recipients. Specifically, the Legislature directed the Department to develop a rate setting methodology that considers *certain minimal factors*. (R-97) (emphasis added).

The Legislature's intent is the controlling factor in this case. Under New York law, the central tenet of statutory construction is that a statute should be construed to effectuate the intent of the Legislature. *People v. Finnegan*, 85 N.Y.2d 53, 58 (1994), *cert. denied*, 516 U.S. 919 (1995). Further,

> [i]n the interpretation of statutes, the purpose of the act and the objectives to be accomplished must be considered. It is the legislative intent that is the great and controlling principle, and the primary consideration of the courts in the construction of statutory provisions is to ascertain and give effect to that intent.

People v. Cypress Hills Cemetery, 208 A.D.2d 247, 252 (2d Dept. 1995), *citing*, McKinney's Consolidated Laws of N.Y., Book 1, Statutes § 92(a); *Niesig v. Team I*, 76 N.Y.2d 363 (1990).[7]

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7. Significantly, the Court of Appeals never reached this issue. Instead, the Court allowed the Attorney General to apply his interpretation on an *ad hoc* basis, with the criminal jury serving as the final arbiter.

The Attorney General has violated this basic tenet by demanding, in effect, that providers' reimbursement rates equal the rates charged to self-pay clients. Critically, the Attorney General's interpretation of "charges the general public" would render a providers' *actual costs* of providing services irrelevant and, instead, reimburse the provider at a rate that reflects the self-pay client's ability to pay, *not* the provider's actual costs. Moreover, the Attorney General's *ad hoc* definition of the appropriate reimbursement rate lacks a cognizable methodology and ignores the Legislature's plain directive that *at a minimum* the five factors listed above must be considered.[8]

In sum, the Legislature's intent was crystal clear when it gave DSS the mandate to develop a rate reimbursement methodology for personal case services: the methodology was to reflect providers' actual costs. The Attorney General's unauthorized and unsubstantiated interpretation of the "rate the provider charges the general public" at least ignores, and at worst, deliberately contravenes, the Legislature's intent.

B. The Attorney General's Interpretation Violates The Intent of the Regulating Agency.

The Attorney General's interpretation of the "general public" language of the Regulation violates the express intent of DSS, the agency charged with the development, implementation and interpretation of the Regulation at issue. The intent of the administrative agency that promulgated a regulation is key to the interpretation of a regulation. *Cortland-Clinton, Inc. v. New York State Dep't of Health*, 59 A.D.2d 228, 231 (4th Dept. 1977).

Effectuating the intent of the Legislature, DSS clearly stated that the intent behind the Regulation was to ensure that "personal care services payment rates would more closely reflect providers' *actual costs* of providing personal care services" to Medicaid recipients. For example, the intent to base the reimbursement

8. UHC's brief fully discusses the undisputed failure (or refusal) of DSS or the Legislature to explicate or define the "public charge" language the Attorney General relies upon.

methodology on providers' actual costs is found, *inter alia*, in the alternative rate setting methodologies considered by DSS, but ultimately rejected. DSS considered a methodology based on a uniform price or fee set by DSS that it would pay to all providers regardless of the providers' actual costs. DSS also considered a methodology by which "providers' existing negotiated rates would simply be adjusted by a trend factor to account for inflationary increases in their costs of doing business."[9]

Finally, DSS's Regulatory Flexibility Analysis summarizes its conclusion regarding the effect of the Regulation:

> The rate methodology that the proposed regulations would require may affect the rates at which providers are paid for personal care services. *Such payment rates should, however, be equitable because they would reflect providers' actual and allowable costs of doing business* and include an adjustment to account for inflationary increases in such costs. (R-108) (emphasis added).

Given the legislative mandate, as well as DSS's intent in promulgating the Regulation, there can be no doubt that DSS's rate reimbursement methodology was meant to reflect the providers' actual costs for services rendered to Medicaid recipients.

As a final matter, the rules of administrative construction preclude the Attorney General's interpretation of the "public charge" regulation and compel this Court's rejection of that construction. Where the plain meaning of a regulatory term cannot be construed from the face of the regulation, the administrative intent behind the promulgation of the regulation should be looked to. *Cortland-Clinton, Inc. v. New York State Dep't of Health*, *supra*, at 231; *see also New York State Clinical*

9. Both alternatives were rejected: the former because DSS did not have enough data on providers' actual costs of doing business, the latter because the methodology would not reflect providers's actual costs of doing business.

Laboratory Association, Inc. v. Kaladjian, 194 A.D.2d 189, 193 (3d Dept. 1993), *aff'd*, 85 N.Y.2d 346 (1995) (refusing to uphold DSS's interpretation of its own regulation where such an interpretation "significantly alters the language of the regulation and is in disharmony with its administrative history"); *and see People v. Cypress Hills Cemetery*, *supra*, at 251.

In sum, it is clear that the phrase "charges to the general public" cannot mean the highly variable rates that providers charge self-pay clients whose personal circumstances and service needs differ widely and unpredictably. The Attorney General would have this Court believe otherwise, but his interpretation flies in the face of the legislative intent underlying the Regulation because it fails to consider providers' *actual costs*. It also clearly contravenes DSS's own words which speak for themselves: the regulation was enacted to ensure that "personal care services payment rates would more closely reflect providers' *actual costs* of providing personal care services" to Medicaid recipients. The Attorney General cannot and should not be allowed to define a regulatory term in a way that is clearly contrary to the express purpose and intent of the Regulation — and do so in a manner that would have Draconian civil, administrative and criminal consequences to unwitting providers.

C. The Attorney General's Redefinition of the Medicaid Reimbursement Rate Violates New York State Public Policy and Will Have a Devastating Effect on the Personal Services Program in New York.

As noted above, the Legislature has plainly declared its commitment to expanding the role of home health care agencies which provide personal care. When the Legislature enacted statutory authority for certified and licensed home health agencies, it revealed its deep-rooted commitment to *expanding* home care services to New York "as a viable part of the health care system and as an alternative to institutional care. . . ." *See* Public Health Law § 3600. (*See*, *supra*, p. 6.)

The Attorney General's efforts to impose a new Medicaid reimbursement rate, with concomitant civil and criminal

penalties, contravene a fundamental state public policy favoring the expanding role of home health services. If the Attorney General unilaterally redefines the reimbursement rate as a rate less than that reflected in the contract entered into by the counties and providers — and thereby less than providers' actual cost of providing services — and recoups the putative "overreimbursement" that personal care providers have received since 1994 to date, personal care providers will go out of business. If these providers are required to pay hundreds of thousands or millions of dollars, as the Attorney General now seeks from UHC, providers will have literally no choice but to go into bankruptcy. Moreover, the owners and operators will also be subject to criminal sanctions under the Attorney General's theory — even though the monies they accepted were based on actual cost rates determined by the State, in accordance with the State-created methodology and in accordance with the express terms of their contracts. If personal care providers go out of business, New York State's elderly, disabled and infirm will be deprived of access to the personal care services they need and currently receive. This is an untenable and inhumane result, and is diametrically opposed to the unequivocal public policy articulated by the Legislature in its pronouncement of intent to provide health care services for the needy.

Even if the Attorney General's reimbursement scenario is implemented prospectively only, it still will have a catastrophic impact on the ability of the uninsured elderly, disabled, ill and infirm to receive essential personal care services. As noted above, by definition, the reimbursement rates established in accordance with 18 N.Y.C.R.R. § 505.14(h)(7) reflect the *actual costs* to the providers. Thus, to the extent that personal care providers will be required to accept less than the established Medicaid rate, there will be a huge shortfall between the actual cost of services rendered to Medicaid recipients versus the reimbursement the agencies receive. If a Medicaid

reimbursement rate is tied to the lowest self-pay rate the provider receives, providers will be faced with a perverse set of options: (1) stop providing services to self-pay clients altogether; (2) raise the rates of self-pay clients to the established Medicaid rate, thereby shifting to the uninsured sector of our population an even greater financial burden; or (3) stop providing personal services to Medicaid recipients.[10] Any of these options will lead to a reduction in home care service to some segment of the population — a result which is patently contrary to state public policy and is clearly undesirable, in terms of the safety, health and well-being of the individual, and of all medically needy New Yorkers.[11]

The Attorney General's unprecedented enforcement campaign will also lead inexorably to the increased institutionalization of the elderly and the infirm, which is directly contrary to the policy articulated by the New York State Legislature when it enacted Article 36 of the N.Y. Public Health Law. Individuals who are no longer able to find or afford personal care services may have no alternative other than to resort to State-funded institutionalization. They will, in short, obtain hospital or nursing home care at far higher costs to the taxpayer than if those services were provided at home, and they will be cared for in a highly (and unnecessarily) restrictive environment. This, of course, would be antithetical to New York State's public health objectives and public policy.

The Attorney General's prosecutorial scheme creates other significant complications in addition to those noted above.

10. The uninsured, who often cannot pay full fare, obviously should not be charged list price and a provider's charitable or benevolent motivation should not be what criminalizes its actions.

11. As a practical matter, the vast majority of self-pay clients will be left with no access to personal care services, particularly if they live in small or rural areas. By definition, such areas do not have a wide array of alternative services or charitable providers available in the community. Thus, those needy individuals who have no alterative providers available will be left in a terrible situation in which personal care needs will simply go unmet.

The State has at times produced its final Medicaid rates ten months after the rate year has commenced. Therefore, where the rates set in contracts with private paying clients turn out, ultimately, to be lower than the Medicaid rates, personal care providers have a dilemma. To avoid the Attorney General's civil and criminal sanctions,[12] the providers could, theoretically, try to recoup from the self-pay clients a higher rate retroactively. As a practical matter, however, the providers' chances of success using this method are virtually nil. Parties contract in advance for services to be rendered in exchange for a certain payment. Providers and those with whom they contract cannot be expected to alter the material terms of their contracts almost a year into those contracts — if, indeed, the contracts have not by then already been fully performed.

As a final matter, the Attorney General's actions to date have already put personal care providers in the State of New York in a state of crisis. They have complied with the rules and regulations set forth by DSS, they have provided their annual cost reports, and they have been paid their actual costs pursuant to the Medicaid reimbursement rate set by the State. As a result of the Attorney General's personal care initiative, no provider now knows for certain what standard will be applied to its business, whether that standard will be applied retroactively or prospectively, or whether it will arise in a civil and/or a criminal context. In short, the Attorney General's interpretation of the "general public" charge has already created, and will continue to create, a highly volatile situation.[13] The destablizing effect of

12. To compound the problem, once a criminal prosecution is initiated by indictment, the provider must cease all operations.

13. In addition, the Attorney General's efforts to engraft upon the regulation his own rate-making mechanism raises the specter of unpredictable and inconsistent variations in the interpretation of the regulation in the future. The very "flexibility" of a regulation that would, according to *this* Attorney General, allow him to prosecute some categories of personal care providers and not others, and would allow the *next* Attorney General, or the Attorney General who follows him, to

(Cont'd)

the Attorney General's reimbursement strategy puts New York State's entire personal care network in serious jeopardy and violates fundamental principles of fairness and due process, and contravenes New York public policy favoring the expansion of personal care services.

II.

CRIMINAL PROSECUTION OF A HOME CARE SERVICES PROVIDER ON THE BASIS OF AN ALLEGED VIOLATION OF A MEDICAID REIMBURSEMENT REGULATION, PROMULGATED BY A STATE ADMINISTRATIVE AGENCY, IS UNAUTHORIZED, IMPERMISSIBLE AND UNDERMINES THE PURPOSE AND INTENT OF THE STATUTE, REGULATIONS AND NEW YORK STATE PUBLIC POLICY

Trade organizations such as HCP are routinely engaged with the Legislature and regulatory agencies in the development of policies affecting the provision of health care services. However, where such policy is being shaped through criminal enforcement, or the chilling effect of the threat of such enforcement, the normal dynamics of policy development are entirely distorted. For decades, health care policy has been shaped by the interactions of interest groups with regulators and legislators. Criminal enforcement did not present issues of usurpation of power: such enforcement was based on a clear statute and well-defined usage. This process has now been reversed under the rubric of fighting potential health care fraud. It is now routine to find agencies such as New York's Medicaid Fraud Control Unit (MFCU) enforcing their own unique concept of health care policy.

(Cont'd)
interpret that same regulation differently. The consequences are obvious and frightening: providers who acted in 1998 in a manner that was proper and consistent with *this* Attorney General's approach to the regulation may find themselves prosecuted tomorrow, or next year, because another Attorney General takes a different (and unpredictable) view of this regulation.

It is critical for this Court to grant certiorari in this case to assure that the balance of prosecutorial power does not tip impermissibly into the realm of policy-making. If the generic reference to compliance "with all applicable laws and regulations" imbues prosecutors with the power to prosecute, they will in effect be given virtually unfettered ability to implement a state-wide campaign to enforce their interpretations of particular regulations.[14]

A prosecuting agency's ability to threaten and assert such broad power should be subject to a pre-emptive legal challenge, such as declaratory judgment actions of the sort commenced by UHC. Only in this manner can Courts ensure that the liberty and advocacy rights of similarly affected providers are not violated by the threat of facing the Grand Jury if they cannot afford to settle with the MFCU. In the absence of this Court's protection, providers are faced with the development of policy through the criminalization of a failure, intentional or inadvertent, to comply with all "applicable regulations" — an undefined phrase until such time as the prosecutor decides to interpret and, simultaneously, enforce it.

The particular regulation used by the MFCU herein involves an area of health care which not only affects payments to Medicaid but greatly influences how care will be priced to those who are not Medicaid recipients. It does so by incorporating the broad terms "charges to the general public." The Court of Appeals failed to provide a limiting construction of these terms in the decision below. Instead, the Court simply noted that these terms exist in similar, although not identical language, in other aspects of the Medicaid, Medicare and even the Veteran's Administration laws and regulations. The Court failed to appreciate how such regulations must be defined before they

14. In fact, this is what occurred herein. The MFCU instituted a state-wide review of the home care industry's compliance with the public charge regulations. While many agencies were able to settle with the MFCU and pay back sums claimed by the AG to be "overpayments" under the regulation, those who could not settle were subject to prosecution.

can ever be effectively implemented in the realities of the health care industry. In fact, the Federal government has rarely implemented regulations such as the "public charge" concept without exhaustively defining such concepts *in terms of how they would be applied.*

For example, Federal regulations authorize the use of a "usual and customary" charge limitation only in very narrow areas as defined by the type of service being provided. The Attorney General cited generally to such provisions before the state high court without any elaboration as to the guidelines, criteria and standards which are exclusively related thereto. Terms such as the "usual and customary charge" and the "general public" may only gain meaning as structured and defined by a payor for specific provider types (*e.g.*, pharmacy, physicians, hospitals). With respect to Medicaid standards, the only areas wherein a "usual" and/or "customary" charge is required are pharmacy and in-patient hospital services. *See* 42 C.F.R. § 447.331(b)(2) (drugs: "usual and customary charge"); 42 C.F.R. § 447.271 (inpatient services: "customary charge"); 42 C.F.R. § 447.325 (Other in-patient and Outpatient Services: "prevailing charges in the locality for comparable services under comparable circumstances"). For personal care, no specific payment limitation exists aside from 42 U.S.C. § 1396-a(a)(30).

The Attorney General's citation to other regulatory provisions before the Court of Appeals differed significantly with the position taken at the intermediate and trial court levels. The Attorney General cited to such laws without stating whether any standards were developed or disseminated to the particular industry involved with respect to each category of service. In fact, such concepts have been dormant without the necessary development of standards and definitions by the affected agency. An example of how other payors administer these terms is reflected in Medicare program standards. For some time, the Department of Health and Human Services (HHS) has sought to finalize a *proposed* regulation which would define "actual charge". Through appropriate rule making, the agency has stated

a desire to define the term. *See* 62 Fed. Reg. 33158, 33185 (Proposed Fee Code Changes for 1998) (reproduced in relevant part in Appendix B).

In other areas of federal regulation, the federal government sought to define "usual charges" as that term is used in 42 C.F.R. § 1001.701(a)(1). HHS began to consider defining the key terms in this regulation in April 1990. *See* 55 Fed. Reg. 12205-02 (Apr. 2, 1990). In January 1992, HHS determined *not* to define the term even though it "would be helpful to the public to have some additional guidance on what standards the OIG intends to apply" in such cases. *See* 57 Fed. Reg. 3298-01 (Jan. 29, 1992). By September of 1997, HHS once again solicited comments on the scope of this general rule. *See* 62 Fed. Reg. 47182-01 (Sep. 8, 1997) (reproduced in relevant part in Appendix C). After almost a decade of deliberating over how such terms should be defined, the Federal government decided that the use of such regulation was outmoded given modern day payment systems and that the lack of clarity would impede enforcement in any event, and declined to define the term. *See* 63 Fed. Reg. 46676 (Sep. 2, 1998) (reproduced in relevant part in Appendix D). Most recently, in May of this year, HHS has once again placed the definition of such terms on its schedule of regulatory agenda items as set forth in May 2001. *See* 66 Fed. Reg. 25399 (May 14, 2001). This roller-coaster of regulatory activity/ inactivity in defining key terms of an enforcement regulation reflects the extreme vagueness of the underlying concept of limiting Medicaid payments to amounts "usually charged" or charged to the "general public".

It is also significant that the Attorney General avoided all references to a State regulation which prohibits providers from submitting claims to the Medicaid program which are "substantially in excess" of the provider's "usual charges or costs" to the "general public." *See generally* 18 N.Y.C.R.R. § 515.2. That regulation, which relates to all Medicaid programs, affirmatively describes certain conduct to be an unacceptable

practice. 18 N.Y.C.R.R. § 515.2.[15] Included are the submission of claims in "amounts substantially in excess of the customary charges or costs to the general public." *Id.* The contrast in wording between the public charge regulation and the unacceptable practice regulation shows that the public charge regulation, on its face, does not speak to, or direct compliance from, the general public.

As noted by the Federal government when it failed to define "usual charge", this concept is outdated and lacks support in today's age. For example, in the State of Connecticut, the Federal government previously invalidated the use of a public charge limitation in the Medicaid context when it meant reimbursing providers at below Medicaid costs. *See* Dec. of Admin. of Dep't of Health, Educ. and Welfare, dated May 28, 1971 (reproduced in relevant part in Appendix E). This decision reflects the basic posture of most agencies which have carefully reviewed whether the economics of using non-Medicaid payors such as private individuals would properly reflect actual Medicaid costs and how the use of a "public charge" may have adverse and inflationary effects on prices paid by the "public" at large. This is an important matter of public policy which should not be left to criminal enforcement agencies for definition and promulgation of standards.

Unlimited criminalization of the Medicaid regulations in this fashion provides inadequate notice and invites — indeed, begs — the other vice that the void-for-vagueness doctrine is concerned with: arbitrary prosecution. The prosecutors in this case are saying nothing less than that, in the case of an individual

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15. Section 515.2 reads, in pertinent part:

> (b) *Conduct included.* An *unacceptable practice* is conduct which constitutes fraud or abuse and includes the practices specifically enumerated in this subdivision. (1) False claims. (i) Submitting, or causing to be submitted, a claim or claims for: . . . *(d)* amounts substantially in excess of the customary charges or costs to the general public.

18 N.Y.C.R.R. § 515.2(b).

who signs a Medicaid reimbursement claim certification, they can prosecute that individual for any violation of any federal or state regulation they believe the individual violated. By this sleight of hand, a panoply of administrative regulations, never enacted as criminal laws by any legislature, become, in effect, criminal statutes.[16] This is clearly a dangerous and untenable outcome.

III.

THE ATTORNEY GENERAL ENTERED INTO THE VACUUM CREATED BY THE STATE REGULATORS WHERE THEY NEITHER DEFINED NOR IMPLEMENTED THE PUBLIC CHARGE CONCEPT

As is evidenced by the State's own internal memoranda, basic policy issues were involved in deciding whether to include individuals who are insured through HMOs or managed care entities as part of the defined "public" to be included in the "public charge concept" because such inclusion would have an inflationary effect and, thus, run to the detriment of the State as a whole:

> I note that our decision on this matter may have far-reaching implications for the provider community. Specifically, I understand that providers such as laboratories, pharmacies, DME dealers, etc., may have contractual agreements with hospital facilities/ medical institutions or other third party payors to provide goods and services at a rate lower than that which is reimbursed by Medicaid. Any decision to include such entities under the general definition of the "general public" may result in the need for providers to re-evaluate their contractual agreements with such entities. (R-111-112)

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16. Critically, the case was all but presented as such at the trial below. The prosecutor presented the case as involving the violation of a "simple rule" that a private person cannot be charged less than Medicaid.

The State agency which had promulgated this regulation was itself perplexed in trying to construe the term internally and, when confronted with whether a particular segment of the "general public" should be included or not, always opted for exclusion so as not raise any inflationary concerns.[17]

The Attorney General's own interpretation of "public" within this case is narrowed to those who pay out of their own pocket. Such a restrictive interpretation is at odds with both common usage and the dictionary definition of the term "general public." He has not included Medicaid beneficiaries within the term "general public," nor has he included any other clients of UHC who have payments made under managed care programs, county-run programs for the elderly, or special programs associated with child protective services.

In addition to these deficiencies, the Attorney General has failed to demonstrate how his position on the interpretation of the regulation would, in any way, further his stated purpose of reducing health care fraud in New York or otherwise serve the public interest.

CONCLUSION

For the foregoing reasons, HCP respectfully requests that this Court issue a writ of Certiorari to the New York Court of Appeals to review the constitutional issues presented herein and award such other relief as this Court shall deem just, proper or equitable.

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17. Indeed, the Attorney General's enforcement of the regulation in this and other cases will cause private citizens across the State to incur higher prices for the delivery of home care services to the extent that they have no insurance or are not enrolled in any managed care plans. This is due to his position that only self-pay individuals are members of the "general public." As such, the Attorney General's interpretation prohibits the giving of any discounts to such self-paying patients while allowing discounts to any other payor source. The economic effects of this position evidence its perversion because they encourage cost shifting from large organizations to those who are least capable of paying for their care.

Respectfully submitted,

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APPENDIX A — N.Y. PUBLIC HEALTH LAW § 3600

The Legislature hereby finds and declares that the provision of high quality home care services to residents of New York State is a priority concern. Expanding these services to make them available throughout the state as a viable part of the health care system and as an alternative to institutional care should be a primary focus of the state's actions.

Home health care has only recently been recognized legislatively as an integral part of the health care delivery system and has proven to have an important and valuable role in patient care. *The certified home health agencies render a coordinated array of services to patients in their homes, thereby avoiding prolonged institutionalization, concomitant high costs and association adverse social and medical implications.*

The legislature intends that there be a public commitment to the appropriate provision and expansion of services rendered to the residents of the state by certified home health agencies, to the maintenance of a consistently high level of services by all home care services agencies, to the central collection and public accessibility of information concerning all organized home care services, and to the adequate regulation and coordination of existing home care services.

N.Y. Public Health Law § 3600 (emphasis added).

APPENDIX B — 62 FED. REG. 33158, 33185

There is no definition of "actual charge" in the Medicare statute, and some would argue that "actual charge" means whatever amount the physician, supplier, or other person who furnishes the service states it is, regardless of whether he, she, or it charges the beneficiary or the beneficiary's private plan that amount or makes any effort to collect it. In fact, because of the prevalence of participation in private plans, the physician, supplier, or other person might never charge or expect to collect this amount from anyone.

APPENDIX C — 62 FED. REG. 47182-01 (SEP. 8, 1997)

Section 1001.701, Excessive claims or furnishing of unnecessary or substandard items or services

In an effort to more clearly define the scope of an action under section 1128(b)(6) of the act, we are proposing to revise paragraph (a)(1) of this section to further clarify to whom an individual's or entity's excess charges or costs apply. The revised language would indicate that the OIG may exclude an individual or entity that has submitted, or caused to be submitted, bills or requests for Medicare or State health care program payments that contain charges or costs that are substantially in excess of their usual charges or costs for items or services furnished to any of their customers, clients or patients. We specifically welcome comments on this OIG policy clarification.

APPENDIX D — 63 FED. REG. 46676 (SEP. 2, 1998)

Section 1001.701, Excessive Claims or Furnishing of Unnecessary or Substandard Items or Services

Comment: In an effort to more clearly define the scope of an action under *section 1128(b)(6) of the Act*, we proposed to revise §1001.701(a)(1) to further clarify to whom an individual's or entity's excess charges or costs apply. Many commenters strongly objected to what they believed was the OIG's setting of Medicare payment policy (for bills submitted on the basis of costs or charges) at the best price charged to any payer. Specifically, the proposed language addressed possible exclusion of providers that have "submitted, or caused to be submitted, bills or request for Medicare, Medicaid and all other Federal health care program payments that contain charges or costs that are substantially in excess of their usual charges or costs for items or services furnished to any of their customers, clients or patients." Many of the commenters indicated that this proposed revision would create excessive administrative and billing difficulties that would require a comprehensive and consistent review of charges to all customers. Further commenters stated that this proposal would have substantive implications for providers who work with managed care programs, discouraging providers from entering into these discounted rate arrangements or possibly forcing physicians participating in these programs to increase their contract rates in an effort to recover what may constitute a loss on Medicare program claims. In addition, commenters indicated that the proposed

revision fails to take into account that most physician payments under Medicare are now determined by a resource-based relative value scale system.

Response: Many commenters misunderstood our proposal. The proposed rule intended to subject those who submit bills based on costs or charges to liability for exclusion if they presented bills for amounts "substantially in excess" of lowest prices charged any customer. Nevertheless, persuasive arguments have been raised, and we are withdrawing our proposed modification to §1001.701 at this time. We have become convinced that the prohibitions of *section 1128(b)(6)(A) of the Act* have very limited applicability with respect to the current Medicare reimbursement system. The recently-enacted Balanced Budget Act of 1997, Public Law 105-33, either directly mandates prospective payment or provides authority for the Secretary to develop additional fee schedules to replace almost all existing cost or charged-based reimbursement methodologies. The purpose of fee schedules is to bring Medicare reimbursement more in line with market rates. As fee schedules are implemented, providers may have less incentive and less opportunity to claim Medicare payment that is substantially in excess of their usual charges. Therefore, we would expect this statutory authority to have declining relevance within the Medicare reimbursement system. *Moreover, the statute contains the undefined term "substantially in excess," which makes enforcement action difficult. As such, we now believe that modifying the definition of "usual charges" will have very little impact.*

APPENDIX E — EXCERPT FROM DECISION OF ADMIN. OF DEP'T OF HEALTH, EDUC. AND WELFARE, DATED MAY 28, 1971

> The effect of the Connecticut provision is to place a ceiling on the amount which can be paid to a participating hospital for inpatient care. *Moreover, . . . the ceiling is one which will not, in many cases, reimburse the hospital for the actual costs of providing care to Title XIX patients, based as it is on the lowest published charge, and not on a system of average charges.* Consequently, the effect of the ceiling may very well be to shift part of the cost of providing such care to Title XIX patients onto other paying patients, or the provision of substandard services to Title XIX patients.

See Decision of Admin. of Dep't of Health, Educ. and Welfare, ~~dated~~ May 28, 1971, reproduced at R. 200; also reported at CCH Medicare/Medicaid Guide, ¶ 26,304.

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No. 01-248

IN THE

Supreme Court of the United States

ULSTER HOME CARE INC., *et al.*,

Petitioners,

-and-

DANIEL RUBIN,

Petitioner,

v.

ELIOT SPITZER,
as Attorney General of the State of New York,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE NEW YORK COURT OF APPEALS

REPLY BRIEF

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STATEMENT PURSUANT TO RULE 29.6

Petitioners' Rule 29.6 Statement was set forth at page ii of their Opening Brief, and there are no amendments to that Statement.

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INTRODUCTION

Petitioners respectfully submit this Reply in response to the jurisdictional issue raised by Respondent at point I of his Brief in Opposition. The twin decisions involved herein are "final judgments" within the meaning of 28 U.S.C. § 1257. Respondent's argument cuts to the heart of the constitutional issue raised by this Joint Petition. The ability to immediately attack a "facially" defective law is critical to our American system of civil liberties. If vague laws which are used for criminal enforcement purposes are unreviewable under Section 1257 unless they are first decided "as applied" to the facts of a particular criminal matter, defendants in criminal cases and those who are subject to a prosecutor's threats of prosecution must suffer the very deprivation of liberty which the "facial" analysis is designed to overcome.

Because New York's high court has historically and uniformly required an "as applied" analysis in vagueness challenges and because such a process inevitably involves an *ad hoc* application of the laws being attacked as lacking enforcement guidelines, this case merits review before significant and fundamental liberty rights are trammeled. The insidious nature of such deprivations have forced those under the Attorney General's scrutiny to either settle by paying large sums of money or plea bargain their rights rather than face a criminal trial to assert the "as applied" defense.

This Court has set forth four exceptions to the finality rule with respect to State court decisions. (*Cox Broadcasting Corporation v. Cohn*, 420 U.S. 478 (1975).) Petitioners fall within the first and fourth exceptions therein.

I.

THE FINAL JUDGMENT RULE DOES NOT PRECLUDE JURISDICTION OF THE FACIAL INVALIDITY OF THE "PUBLIC CHARGE" REGULATION.

As noted in *Cox Broadcasting*, the first exception involves situations where there are "further proceedings — even entire trials — yet to occur in the state courts" yet "the federal issue is

conclusive *or* the outcome of further proceedings preordained". (*Ibid.* 420 U.S. at 479, emphasis supplied.)

Both the decisions in *Ulster* and *Rubin* represent the final judgment of the New York Court of Appeals as it involves the "facial" invalidity of enforcing the "public charge" regulation. Nothing will change the high court's ruling as a result of any of the proceedings currently underway in the remittal of *Ulster*'s case or *Rubin*'s remand.[1] There is no question that as to the use of the "public charge" regulation to prosecute home care agencies, the high court's decisions are "final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein". (*Jefferson v. City of Tarrant*, 522 U.S. 75, 81 (1997).) Under such circumstances, the New York high court "has finally adjudicated the constitutionality" of the regulation at issue. (*Duquesne Light Co. v. Barasch*, 488 U.S. 304, 308 (1989).) Respondent's Brief in Opposition fails to explain how any of the remaining proceedings in *Ulster* or *Rubin* will change in any way the Court of Appeals' ruling.

Mr. Rubin is presently serving his prison term in a correctional facility. The basis for remand in his case does not involve any re-examination of the facial validity of the "public charge" regulation. Rather, the remand involves prosecutorial excesses at trial and sufficiency of the evidence, *inter alia.* A most significant issue, for example, involves the fact that the prosecution represented to the jury that Mr. Rubin had filed statements asserting compliance with "all applicable rules and regulations" when in fact the certifications did not contain such language for some of the earlier periods charged in the indictments. In a decision rendered after this Joint Petition was

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1. In *Ulster*, after reversing the grant of summary judgment, the Court of Appeals remitted the case to the trial court for further proceedings not inconsistent with the court's ruling. Shortly thereafter, the Attorney General moved to vacate the preliminary injunction in the case. The decision on remand in the *Rubin* case and the decision vacating *Ulster*'s preliminary injunction (as well as those staying such decision on appeal) are included in a supplemental appendix annexed hereto.

filed, the Appellate Division rejected such arguments, noting that the jury had sufficient evidence and that by making certifications of compliance with all applicable regulations, "defendant implicitly was certifying that the rates charged to the general public were the same or greater than the rate sought in the certifications for reimbursement when they were not." (286 A.D.2d 555, 729 N.Y.S.2d 561 (Aug. 30, 2001) (Appendix, 3a hereto.) Significantly, the Appellate Division also affirmed Mr. Rubin's criminal sentence.

With respect to Ulster Home Care, the remittal allowed the Attorney General to seek vacatur of the preliminary injunction so that he would be free to fully prosecute this non-profit agency. As noted by the Respondent's Brief in Opposition, "before there can even be a trial", the prosecution intends to seek either a new indictment or reinstatement of the indictments which he previously obtained in contempt of court. (Respondent's Brief at page 8.) Such a result would then leave to the jury the important policy questions of defining who are Ulster's members of the "general public" and what level of "charges" are appropriate. As noted by the *Amicus Curiae*, such questions are usually resolved by regulation or legislative intent, not be a free-for-all attempt to convince jurors of each respective side's interpretation *in a criminal trial*. (*See* Brief of *Amicus Curiae* at page 15.) Accordingly, to subject Ulster Home Care (as well as all other providers who have different types of "charges" and "general public" customers) to such an *ad hoc* process represents the very deprivation which is triggered by the Court of Appeals' disposition. Such a disposition should be considered "final" for purposes of Supreme Court review. (*See National Socialist Party v. Village of Skokie*, 432 U.S. 43 (1977); *Nebraska Press Association v. Stuart*, 423 U.S. 1327 (1975).) Petitioners herein claim the right not to be prosecuted except by reference to clearly defined laws, the "legal and practical value of which would be destroyed if it were not vindicated before trial". (*See United States v. MacDonald*, 435 U.S. 850, 860 (1978).)

II.

IMPORTANT FEDERAL POLICY WARRANTS REVIEW OF THE FEDERAL QUESTION DESPITE SUBSEQUENT PROCEEDINGS IN STATE COURT.

This Court retains jurisdiction under 28 U.S.C. § 1257 where a

> federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review . . . might prevail on the merits on non federal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action . . .

Florida v. Thomas, 532 U.S. 774, 121 S. Ct. 1905, 1906 (June 4, 2001), quoting *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).) This limitation represents the fourth exception to the finality doctrine identified in *Cox Broadcasting*. Both *Ulster* and *Rubin* fall within this very limited exception allowing review where important Federal questions are raised in light of the strong policy considerations at stake with respect to the correct standard of review for facial invalidity of vague laws.

A. Importance of the Federal policy prohibiting criminal enforcement of undefined laws.

In order to fall within the fourth exception set forth in *Cox Broadcasting*, the underlying decision must involve an important "federal policy". In this case, where vague laws are enforced criminally the appropriate rule of finality should be similar to that which is applied to appeals involving First Amendment rights. (*See Fort Wayne Books v. Indiana*, 489 U.S. 52, 55 (1989) ("Adjudicating the proper scope of First Amendment protections has often been recognized by this Court as a 'federal policy' that merits application of an exception to the general finality rule".)

As noted in the Petition, this Court's holding in *City of Chicago v. Morales*, 527 U.S. 41 (1999), would strongly suggest that courts throughout the Nation should apply a more stringent level of "facial" review in criminal vagueness challenges. Without such level of scrutiny, arguments as to whether a law sets forth sufficient definitions and guidelines will be given short shrift despite deficiencies in the law itself. In the mania which is sometimes created to fight health care fraud, this type of treatment is not uncommon once the momentum of an indictment is triggered. Yet, the individual liberty rights of those unfortunate enough to be targets should be given considerable weight where a law has absolutely no promulgated definitions nor has developed any well-defined usage.

Here, the Court of Appeals summarily reversed a well reasoned appellate court decision without explaining in any way why an undefined "public charge" regulation could be used criminally. The Court of Appeals merely iterated a conclusion: "Neither the term "general public" nor "rate" as used in the regulation is so vague that it could not be understood by a person of ordinary intelligence *or could be arbitrarily enforced*." (*Ulster*, 96 N.Y.2d 505, __N.E.2d __ (May 10, 2001).) The court then simply referred to a number of other regulations, from payments made by the Veterans Administration to taxi services for vocational services in New York, which contain similar but not identical language.[2] The danger in this line of reasoning is that for every regulation cited by the court showing that these words were used in other contexts, there are just as many regulations showing that such separate programs are uniquely tailored to their own situations and that the regulators define such terms to fit their own policy needs.[3]

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2. None of these regulations cited have anything to do with home care services in New York. Research has failed to disclose any case law interpreting such provisions nor is there any evidence that they were ever enforced.

3. California's Attorney General pursued an almost identical (Cont'd)

Far from following the plurality's views in *Morales* regarding the facial review of undefined laws, the New York Court of Appeals has consistently required that the party challenging a provision as vague be required to show such vagueness "as applied" to him or her. Although the Attorney General asserts that the Court of Appeals has correctly applied the facial analysis set forth in Petitioner's Brief, in fact, the only "facial" review undertaken by the Court of Appeals was to question whether a party could reasonably understand what "charges" and "general public" mean. However, this completely misses the point of *Morales*. The proper inquiry is whether "charges" and "general public" can be understood to so mean so many different things that the law's application becomes whimsical without published guidelines and definitions.

Our system of justice should allow for the substantive review of such undefined laws. The preservation of being a Nation of well-defined laws and not one which allows policy making through criminal enforcement is an important Federal policy. As such, the same level of review afforded to the

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(Cont'd)
case against laboratories in that State. This enforcement campaign was rejected by California's appellate courts:

> In our view, the practice of negotiating discounts for physicians' private-pay patients benefits health care consumers. *** [A]ppellant argues that the practice is unfair to the public because Medi-Cal is not offered similar discounts. This argument, which seems to be at the heart of appellant's case, is wrong. The amount Medi-Cal pays for a test is governed by regulations promulgated by the Department. Under those regulations, Medi-Cal will pay no more than the lesser of the amount billed, the charge to the general public, Medicare's allowance, or scheduled amounts. . . . Medi-Cal, not Duz-Mor, controls the amount Medi-Cal pays.

People v. Duz-Mor Diagnostic Laboratory, Inc., 68 Cal. App. 4th 654, 663, 80 Cal. Rptr. 2d 419, 425-426 (1999).

preservation of Free Speech rights should be afforded to this first essential of Due Process. Civil liberty is too important a concept in our society to be replaced by a judicial deference allowing prosecutors to formulate the law. It is clear that the New York high court has ignored the main thrust of this Court's *Morales* decision.[4] It is not enough to reject a facial attack on the basis that a particular provision may be reasonably understood by an ordinary citizen. If such a provision may be understood ten different ways by ten different people, it leaves enforcement to the whims of a particular prosecutor's interpretation.

The importance of Federal policy in this area spreads beyond Petitioners herein. As noted by *Amicus Curiae*, the field wide is open for prosecutors to make policy. It is insufficient to say that a party's rights will be protected by the jury when that jury will define the very laws set forth in an indictment. This flexibility on the part of a prosecution is critically coercive in that an accused must literally gamble that the jury will see the law as the accused has interpreted it, as opposed to how the prosecution is defining the terms.[5]

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4. The Court of Appeals has uniformly and routinely held that "challenges to statutes which do not involve First Amendment freedoms must be examined in light of the facts of the case at hand". (*State of New York v. Rutkowski*, 44 N.Y.2d 989, 991, 380 N.E.2d 166, 167, 408 N.Y.S.2d 335, 336 (1978).) This holding has been consistently applied by the high court in criminal cases through to the instant applications. As stated by the high court, under this standard, "the courts should not have relied on hypotheses in determining whether the statutes were unconstitutionally vague." (*Ibid.*)

5. On the one hand "charges to the general public" may be reasonably interpreted as the prices used for all clients receiving services from the provider. This would likely exonerate Ulster Home Care. Yet, the Attorney General has interpreted "charges" as being the discounted amounts paid by "self-paying" or uninsured patients for no-frills services. The uninsured constitutes a very small segment of the

(Cont'd)

The court below failed to analyze the significance of the lack of definitions and guidelines given the fact that technical terms were being used by the prosecution in a manner which was inconsistent with policy across the Nation. Instead, the court only reviewed whether the law was so vague that the accused could not reasonably understand that their conduct would fall within its scope. This is fine when one is dealing with words which have common meanings in our culture such as jostling (*See People v. Nelson*, 69 N.Y.2d 302, 514 N.Y.S.2d 197, 506 N.E.2d 907.) However, when the face of the law allows a prosecutor to interpret the term "general public" to mean only "private" or "self-pay" patients *and no other*, there should be serious concern on the part of the courts. Combined with the high court's refusal to provide a limiting construction, a prosecutor's accusation that a provider has lied about regulatory compliance by "implicit certifications" (Appendix "A" hereto) allows the public charge regulation to be a "catchall enactment left at large by the State court which applied it." (*See Beauharnais v. People*, 72 S. Ct. 725, 729 (1952).)

Imbedded within the *Cox Broadcasting* decision itself is the concept that "finality" does not require exhaustion of state remedies when "the subsequent state proceedings would themselves deny the federal right for the vindication of which review is sought in the Supreme Court". (Stern, et al., Supreme Court Practice at p. 104, (7th Ed., © 1993).)

(Cont'd)

"general public" served by most home care providers. (*See Amicus Curiae* brief at page 4.) A person who is liable to spend 14 years in jail should not have to roll the dice of a jury trial to see whose interpretation the jury will find more appropriate under such circumstances. Indeed, this concept is utterly repugnant to our American system of justice.

B. Subsequent State Court Proceedings May Preclude this Court's review of the important Federal questions involved herein.

The second requirement under the fourth exception set forth in *Cox Broadcasting* is that the Petitioners may prevail on state law claims in a manner which may later preclude federal review of the constitutional issue. In this respect, both *Ulster* and *Rubin* involve separate state-law claims which may provide full relief and thus preclude subsequent Federal review. Conversely, review of the facial validity of the "public charge" regulation would terminate the litigation in both cases if the regulation is found to be facially invalid.

As noted in Point I above, the remaining issues in the *Rubin* proceedings involve the sufficiency of evidence supporting his conviction and the use of certifications which did not contain the relevant language as to compliance with "all applicable" regulations, among other things. The Attorney General has noted that there is an outstanding application for leave to appeal to the Court of Appeals on these counts. Although the facial validity of the "public change regulation" will not be re-considered as part of this appeal, there could be a reversal on the basis of the state-law claims.

Similarly, *Ulster* involved a separate state-law basis for declaratory and injunctive relief. In particular, Ulster Home Care had entered into a contract for the provision of Medicaid services which covered the period 1994 and forward. This contract specified that Ulster Home Care was to be paid at a cost based rate and that such payments could not be retroactively reduced. As noted by the Appellate Court, in addition to facially attacking the "public charge" regulation, "Ulster Home moved for summary judgment seeking a declaration that defendant's threatened prosecution violates the contracts between itself and Ulster County". (*Ulster*, 268 A.D.2d 59, at 61, 706 N.Y.S.2d 739 (2000). This aspect of the declaratory judgment action has never been decided due to the Appellate Court's declaration invalidating the "public charge" regulation. However, it is now

the subject of Ulster Home Care's pending appeal as to why the preliminary injunction should stay in place pending a determination by the trial court on all open issues.

In a case very similar to the instant matter, a Federal Circuit Court of Appeals rejected a false claims prosecution as a matter of law regardless of *scienter* issues. (*United States v. Race*, 632 F.2d 1114 at 1120 (4th Cir. 1980).) ("one cannot be found guilty of a false statement under a contract beyond a reasonable doubt when his statement is within a reasonable construction of the contract").) Similarly, Ulster Home Care may ultimately prevail on this state-law issue as part of its claim that the Attorney General should not be allowed to rewrite Ulster's Medicaid contract in a manner which, if done in a civil setting, would amount to a breach thereof. The Attorney General seeks to replace the cost-based payments made to Ulster Home Care as part of this contract with the Attorney General's understanding of the "public charge".

CONCLUSION

For the foregoing reasons, petitioners respectfully request that the petition be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT DATED AUGUST 30, 2001

SUPREME COURT, APPELLATE DIVISION,
THIRD DEPARTMENT, NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

v.

DANIEL RUBIN,

Appellant.

Aug. 30, 2001.

* * *

Before: CARDONA, P.J., MERCURE, CREW III, PETERS and MUGGLIN, JJ.

CREW III, J.

Appeal from a judgment of the Supreme Court (Czajka, J.), rendered May 14, 1999 in Albany County, upon a verdict convicting defendant of the crimes of grand larceny in the second degree and offering a false instrument for filing in the first degree (eight counts).

When this matter was last before us, we held that counts one through seven of the indictment must be dismissed inasmuch as the Medicaid regulation serving as the basis for the fraud alleged in those counts was unconstitutionally vague (271 A.D.2d 759, 706 N.Y.S.2d 225). Upon appeal, the Court of Appeals modified our order by reinstating counts one

through seven of the indictment and remitted the matter to this Court for consideration of the facts and issues raised but not determined on the prior appeal (271 A.D.2d 759, 706 N.Y.S.2d 225).

Initially, we disagree with defendant's contention that all issues raised on the prior appeal, except those as to counts eight and nine, must now be addressed by this Court. As noted in our prior decision, defendant's remaining contentions were determined to be either academic or without merit. What was not academic was the issue of the legal sufficiency of the evidence regarding the dismissed counts and defendant's claim that counts one, two and three must be reversed because the certificates underlying those counts of the indictment did not contain the specific language: "I have reviewed these claims: I (or the entity) have furnished or caused to be furnished the care, services and supplies itemized and done so in accordance with applicable federal and state laws and regulations." With regard to the latter contention, suffice it to note that this issue is not preserved for appellate review inasmuch as it was not raised at the time of trial (*see, People v. Gray*, 86 N.Y.2d 10, 20-21, 629 N.Y.S.2d 173, 652 N.E.2d 919). Moreover, the cited language was not an essential predicate to defendant's conviction of either grand larceny in the second degree or offering a false instrument for filing in the first degree. If the jury concluded, as it undoubtedly did, that defendant submitted claims that were fraudulently inflated, the jury was justified in concluding that he obtained property "by fraudulently inducing the owner to part with both possession and title through the use of false statements" (*People v. Norman*, 85 N.Y.2d 609, 618, 627 N.Y.S.2d 302, 650 N.E.2d 1303) and that he offered the instrument knowing that it contained false information with intent to defraud (*see*, Penal Law § 175.35).

Appendix A

The record reflects that there is a regulation providing that it is improper to bill Medicaid at a higher rate than that charged to the general public (*see*, 18 NYCRR 505.14[h][7][ii][a][1][i]). Various witnesses testified that defendant was aware of that regulation and that he nevertheless submitted certifications requesting reimbursement for personal care services rendered at a higher rate than that charged to the general public. When submitting those certifications, defendant implicitly was certifying that the rates charged to the general public were the same or greater than the rate sought in the certifications for reimbursement when they were not. Thus, there existed legally sufficient evidence to support larceny by false pretense and offering a false instrument for filing. Finally, we find unpersuasive defendant's contention that the sentence was unduly harsh and excessive or that the amount of restitution was based upon an impermissible or improper extrapolation.

ORDERED that the judgment is affirmed.

CARDONA, P.J., MERCURE, PETERS and MUGGLIN, JJ., concur.

APPENDIX B — ORDER TO SHOW CAUSE OF THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT DATED AND ENTERED AUGUST 22, 2001

PRESENT: Hon. Edward O. Spain

STATE OF NEW YORK SUPREME COURT
APPELLATE DIVISION THIRD DEPARTMENT

ULSTER HOME CARE, INC., JAMES MAHONEY and DIANE WIEGAND,

Plaintiff-Appellants

against

DENNIS VACCO, in his capacity as Attorney General of the State of New York,

Respondent.

ORDER TO SHOW CAUSE

Upon the annexed Affidavit of Raul A. Tabora, Jr., Esq., dated the 21st day of August, 2001, and upon the Affidavit of James Mahoney, dated the 21st day of August, 2001 and on all pleadings previously had let defendant show cause before this Court on the 27th day of August, 2001 at 10:00 AM., or as soon thereafter as counsel may be heard why an order should not be made staying the decisions and order of Supreme Court dated August 10, 2001 and duly entered on August 16, 2001 pending appeal thereof to the Appellate Division, Third Department, and it is

ORDERED, that, pending the hearing and determination of this motion brought on by this Order to Show Cause, disposition of this Order to Show Cause, defendant be, and

is hereby stayed from taking any actions pursuant to the Order dated August 10, 2001 and entered on August 16, 2001, and it is further

ORDERED that service of a conformed copy of this Order to Show Cause and the papers upon which it is granted by overnight mail upon the office of the Attorney General, on or before August 22, 2001, be deemed sufficient, and it is further

ORDERED that this motion brought on by this Order to Show Cause shall not be orally argued unless counsel are notified to the contrary by the Clerk of the Court.

ENTER: August 22, 2001

s/ Edward O. Spain
Associate Justice Hon. Edward O. Spain
Appellate Division, Third Department

APPENDIX C — DECISION AND ORDER ON MOTION OF THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT DATED, DECIDED AND ENTERED SEPTEMBER 21, 2001

STATE OF NEW YORK
SUPREME COURT - APPELLATE DIVISION
THIRD JUDICIAL DEPARTMENT

Decided and Entered: September 21, 2001

Case # 90178

ULSTER HOME CARE INC. et al.,

Appellants,

v

DENNIS C. VACCO, as Attorney General of the State of New York,

Respondent.

DECISION AND ORDER ON MOTION

Motion for stay pending appeal.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is granted, without costs.

PETERS, J.P., SPAIN, CARPINELLO, ROSE and LAHTINEN, JJ., concur.

ENTER:

s/ Michael J. Novack
Michael J. Novack
Clerk of the Court

APPENDIX D — DECISION AND ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, ULSTER COUNTY DATED AUGUST 10, 2001

STATE OF NEW YORK
SUPREME COURT
ULSTER COUNTY

Index No.: 98-1461

ULSTER HOME CARE INC. et al.,

Plaintiffs,

-against-

DENNIS C. VACCO, in his capacity as Attorney General of the State of New York,

Defendant.

Decision & Order

Supreme Court, Ulster County
RJI#55-98-00833
Motion Term

Present: E. Michael Kavanagh, JSC

* * *

Kavanagh, J

Defendant seeks an order of this Court vacating the preliminary injunction entered by Supreme Court (Torraca, J) on June 9, 1998. Plaintiffs oppose the motion.

Plaintiffs commenced this action for a determination that 18 NYCRR 505.14(h)(7)(ii)(a)(1), the Public Charge

Regulation, was unconstitutionally vague on its face and as applied. Plaintiffs sought an injunction stopping the Attorney General from prosecuting plaintiffs or imposing any criminal or civil liability on it based upon that regulation. On June 2, 1998, Supreme Court (Torraca, J) enjoined the Attorney General from enforcing the public charge regulation and from demanding payment therefrom, a decision which was affirmed on appeal (255 AD2d 73). Plaintiffs then moved for summary judgment on their claim that the regulation was unconstitutional, which Supreme Court (Torraca, J) denied. The Appellate Division reversed finding that the Public Charge Regulation was unconstitutionally vague on its face (268 AD2d 59), resulting in a judgment from Supreme Court (Torraca, J) being entered thereupon.

In a decision dated May 10, 2001, The Court of Appeals reversed the Appellate Division's decision and found that the Appellate Division had erred in deciding that the regulation was unconstitutional on its face and that plaintiffs "should have been required to show that the regulation was unconstitutional as applied to them". The Court of Appeals reversed the decision of the Appellate Division and Judgment of Supreme Court therefrom and remitted the matter to Supreme Court for further proceedings. This motion resulted.

The Attorney General argues that the preliminary injunction should be vacated because the Court of Appeals determined that "it was error to enjoin plaintiffs' criminal prosecutions" and that under CPLR 6314, the preliminary injunction should be vacated because the Court of Appeals has "removed from this case the premise on which the injunctive relief was based". In response, plaintiffs argue that there was never an appeal of the order granting the preliminary injunction and the Court of Appeals' decision did not review said order and, therefore, the preliminary injunction is the "law of the case".

Appendix D

It is true that the order granting the preliminary injunction was not appealed. It is also true that the Court of Appeals' decision indicated that "[t]he Appellate Division affirmed the grant of the preliminary injunction and the finding of contempt. This prior order does not necessarily affect the judgment here and thus is not brought up for review". However, the Court does not agree that as a result, the injunction may not be vacated by this Court. CPLR 6314 provides that a defendant who is enjoined by a preliminary injunction may move at any time to vacate or modify the injunction. While the Court of Appeals' decision did not impact the effect of the preliminary injunction, it did not prevent this Court from vacating the injunction pursuant to CPLR 6314.

In fact, it is this Court's view that the Court of Appeals' decision, while it did not itself effect its validity, provides support and guidance for this Court's so doing. After concluding that the Appellate Division erred by finding that the regulation was unconstitutionally vague on its face, it also concluded that plaintiffs must be required to establish that it was unconstitutional as applied to them. The Court found that "it was error [for the Court] to enjoin plaintiffs' criminal prosecutions". The Court's basis for this conclusion was the intended charges against plaintiff were grand larceny and offering false instruments for filing, not challenged regulation. Based upon this finding, as well as the conclusion that the regulation was not unconstitutionally vague, this Court believes that the Court of Appeals has, even if not specifically so stated, attacked the basis upon which the injunction was given. In the face of the Court of Appeals' decision, in addition to this Court's finding that the Attorney General should not have been enjoined from imposing criminal or civil liability against plaintiffs, it is the Court's decision that the preliminary injunction prohibiting same shall be herein vacated in its entirety.

Appendix D

Therefore, it is hereby

ORDERED that the motion to vacate the preliminary injunction entered June 9, 1998 is hereby granted and said preliminary injunction is vacated in its entirety.

This constitutes the Decision and Order of this Court. All papers are being returned to the Attorney General. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the provisions of that rule regarding entry, filing and notice of entry.

SO ORDERED!

s/ E. Michael Kavanagh
E. Michael Kavanagh, JSC

Dated: August 10, 2001
Kingston, New York